In the Supreme Court
of the
United States

OCTOBER TERM, 1965

No. 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Petitioner's Brief

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All emphasis is ours unless otherwise indicated.

All record references (R) refer to pages of the printed record.

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No. 20

CARNATION COMPANY, a corporation,
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PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons,[1] defendants, and Federal Maritime Commission, intervener,
Respondents.

Petitioner's Brief

1. The other respondents are the other defendants and appellees below. They are named in the complaint in the caption (R 9-11) and in paragraphs 6-8, 10, 13 (R 13-18).

I.

NATURE OF THE CASE

This case is here on a writ of certiorari, granted March 1, 1965 (R 203), to review a decision of the United States Court of Appeals for the Ninth Circuit (R 157-188, rehearing denied R 200, 201) affirming a judgment of the United States District Court for the Northern District of California, Southern Division (R 138, 139) dismissing an action for treble damages brought under the Sherman Act and the Clayton Act (Part IV, pp. 4, 5 below). The writ was granted on presentation of an important question of relation of the antitrust statutes and their operation to the provisions of an industry regulating statute, the Shipping Act, 1916 (Part IV hereof, p. 5 below), dealing with carriage by water in *foreign* commerce as defined in § 1 of that Act (App. p. 2) and the administration of those provisions.

Petitioner, a shipper by common carrier by water in *foreign* commerce, sued to recover, from the carriers and others, including two conferences of the carriers, treble damages based on a $2.50 per ton tariff overcharge imposed, as an increase over the theretofore lawfully established rate, as a result of a conspiracy in violation of the antitrust statutes in the form of an agreement (for fixing rates) unapproved under the Shipping Act, 1916. On motions of defendants (before they had filed any answer) (R 26-32) and of the Federal Maritime Commission, intervener,[2] (R 34, 35) the action was dismissed *in limine* "on the grounds that primary jurisdiction of the action is in the Federal Maritime Commission" (Jud't, R 138, 139), by reason of the Shipping Act, 1916. As in *McLean Trucking Co. v. United States*, 321 US 67,

2. The Commission did file an answer (R 36, 37). It was careful *not* to deny any of the averments of the complaint and stated that "To the extent that the rules of pleading require an assumption of the admission or denial of the allegations of the complaint * * * such assumption is made."

79 ff (and *Minneapolis & St. L. R. Co. v. United States,* 361 US 173, 185 ff, and other cases below) there was "a problem of accommodation" of an industry statute which contemplates "some diminution of competition" and possible "creation of monopolies", with a statute of general application and broad policy, the Sherman Act, making illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations".

Although the Shipping Act, 1916 § 15 (App. pp. 5-7) dealt with this problem of accommodation by providing that agreements approved under that Act should be lawful, and that *such* agreements "shall be excepted from the provisions of the" antitrust statutes,—"*Approved* agreements are exempted from the antitrust laws." (*F.M.B. v. Isbrandtsen Co.,* 356 US 481, 491),—the result of the decisions below is the same for *unapproved* agreements so far as operation of the antitrust statutes is concerned—the *unapproved* agreements are also "excepted" from Sherman Act § 1 and Clayton Act § 4 (App. p. 1).

II.

OPINIONS BELOW

The memorandum opinion of the District Court (R 137, 138) is not reported.

The opinion of the United States Court of Appeals for the Ninth Circuit (R 157-187) and its memorandum denying petitioner's petition for a rehearing (R 200, 201) are reported in 336 Fed 2d 650-668 and unofficially in CCH 1964 Trade Cases, ¶ 71196, p. 79764.

III.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked upon the ground that a federal question is presented which this Court has jurisdiction to review in that (a) the jurisdiction of the District Court was

properly invoked as the action was one to recover treble damages arising under the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 as amended and particularly § 1 (the Sherman Antitrust Act, 15 USC §§ 1-7),[3] the Act of Congress of October 15, 1914, c. 323, 38 Stat. 730, as amended particularly § 4 (the Clayton Act, 15 USC §§ 12-27)[3] and Judicial Code §§ 1331 and 1337 (28 USC §§ 1331, 1337), (R 11 ff), (b) the action was dismissed by the District Court upon the asserted ground that primary jurisdiction was in the Federal Maritime Commission by reason of the Shipping Act, 1916 (Act of Sept. 7, 1916, c. 451, 39 Stat. 728 as amended, 46 USC § 801 ff)[3] (R 137-139) and (c) on appeal to the Court of Appeals for the Ninth Circuit (R 140-147)[4] it affirmed on this ground (R 157 ff).

The judgment of the Court of Appeals sought to be reviewed was rendered July 30, 1964 (R 157, 187) and was entered on that day (R 156, 187). A petition for rehearing, filed Aug. 27, 1964 (R 188 ff) and within time (U.S. Ct. App., Cir. Ninth, Rule 23), was entertained and denied on September 28, 1964 (R 200, 301).

Judicial Code § 1254(1) (28 USC § 1254(1)) confers on this Court jurisdiction to review the judgment in question by writ of certiorari. The petition to that end was filed November 6, 1964, within time (Judicial Code § 2101(c), 49 USC § 2101(c)) and the case was docketed as No. 657. The petition was granted March 1, 1965.

IV.

STATUTES INVOLVED

The statutes directly involved are:

The Sherman Act, Acts of July 2, 1890, c. 647, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282, §§ 1, 2 and 8 (15 USC §§ 1, 2 and 7);

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3. The pertinent provisions of the statutes are set out in the Appendix to this Brief.

4. Judicial Code §§ 1291 and 2107 (28 USC §§ 1291 and 2107) and Federal Rules of Civil Procedure, Rules 54 (b) and 73. (*U.S. v. Price-McNemar Const. Co.*, 320 F.2d 663, 664 (Cir. 9))

The Clayton Act, Act of October 15, 1914, c. 323; § 4, 38 Stat. 731 (15 USC § 15); and

Shipping Act, 1916, Acts of Sept. 7, 1916, c. 451, 39 Stat. 728; July 15, 1918, c. 152, 40 Stat. 900 (46 USC § 801ff) [later amended Sept. 19, 1961, Pub. L. 87-254, 75 Stat. 522] in so far as it regulated common carriage by water in *foreign* commerce.

Also involved, for their effect on the provisions of Shipping Act, 1916, dealing with *interstate* commerce and the contrast they provide between the schemes of regulation adopted by it for common carriage by water in *foreign* commerce (as defined in Shipping Act, 1916, § 1) and the Congressional scheme of regulation of common carriage between points in the United States are:

Intercoastal Shipping Act, 1933, Act of Mar. 3, 1933, c. 199, 47 Stat. 1425 as amended June 23, 1938, c. 600, § 43, 52 Stat. 964, June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016, Aug. 4, 1939, c. 417, § 2, 53 Stat. 1182, and 1950 Reorg. Plan No. 21, §§ 104(2), 305, 306, 64 Stat. 1274, 1277 (46 USC §§ 843-848); and

Part III of the Interstate Commerce Act (Transportation Act of 1940), Act of Sept. 18, 1940, c. 722 Title II, § 201ff, being Part III of the Interstate Commerce Act, § 301ff as amended (49 USC, ch. 12, §§ 901-923).

The provisions of these statutes are very lengthy and, accordingly, they are set out in the Appendix to this Brief.

V.

THE QUESTIONS PRESENTED

It has not been questioned that, unless something can be pointed to which makes inapplicable the antitrust statutes, the defendants were guilty of violation of the Sherman Act which resulted in injury to the plaintiff in its business and property, for which it can sue under Clayton Act § 4 and recover threefold the damages sustained and cost of suit, including a reasonable attorney's fee.[5]

The gist of the complaint is that by an unapproved agreement the defendants increased the rate for carriage by water from the Pacific Coast to Manila by $2.50 per ton and plaintiff, a shipper of evaporated milk, was forced to pay this increase. It has long been settled that "price-fixing agreements are unlawful *per se* under the Sherman Act" (*United States v. Socony-Vacuum Oil Co.*, 310 US 150, 218, 223ff; *White Motor Co. v. United States*, 372 US 253; *No. Pac. R. Co. v. U. S.*, 356 US 1, 5; *Simpson v. Union Oil Co.*, 377 US 13; *United States v. Parke, Davis & Co.*, 362 US 29; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 US 211; *United States v. Du Pont*, 351 US 377, 387; *United States v. Trenton Potteries Co.*, 273 US 392; *Addison Pipe & Steel Co. v. United States*, 175 US 211). The rule applies to rates of carriers unless some special immunity can be found (*United States v. Trans-Missouri Freight Ass'n*, 166 US 290; *United States v. Joint-Traffic Ass'n*, 171 US 505; *Georgia v. Penn. R. Co.*, 324 US 439, 456; *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 US 474, 480; *Isbrandtsen Co. v. United States*, 211 F2d 51, 57 (Cir. Dist. Col.), c. d. 347 US 990). The result is not different because the basic agreement was reached before the change in rate complained of (*United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290; *United States v. Joint-Traffic Ass'n*, 171 US 505; *Silver v. N. Y. Stock Exchange*, 373 US 341, note 5[6]) nor because of the fact, if it be the fact, that the basic agreement may be one only for a veto power on the change of rates (*Georgia v. Penn. R. Co.*, 324 US 439, 458[7]).

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5. Sherman Act §§ 1, 2, Clayton Act § 4, App. p. 1.

6. "The fact that the consensus underlying the collective action was arrived at when the members bound themselves to comply with Exchange directives upon being admitted to membership rather than when the specific issue of Silver's qualifications arose does not diminish the collective nature of the action. A blanket subscription to possible future restraints does not excuse the restraints when they occur."

7. Holding there was "no warrant in the Interstate Commerce Act" for clothing with legality a conspiracy "to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier."

The defendant carriers, however, were subject to the Shipping Act, 1916. It was claimed that the facts relied on by Petitioner constituted a violation of that Act and that Petitioner's sole remedy was under that Act. The Court of Appeals held that if there might be a remedy under the antitrust statutes still, before it could be invoked, there were matters which must be decided by the agency charged with administration of the Shipping Act, the Federal Maritime Commission and, in such circumstances, the case should not be retained, awaiting the outcome of Commission action, but should be dismissed. The questions presented are:

1. Have the antitrust statutes been repealed by the Shipping Act by implication as to conduct of carriers in foreign commerce which is subject to the Shipping Act?

2. Where conduct in violation of the antitrust statutes also violates the Shipping Act is the only remedy of a party aggrieved under the Shipping Act and, if so, might he not then improperly be deprived of a right of trial by jury?

3. Where Congress, in an industry statute (here the Shipping Act) which applies to conduct which also falls within the antitrust statutes, has provided the means of accommodation of the two statutes and the test for determining application of the antitrust statutes, by providing in the industry statute that specified conduct is excepted from the antitrust statutes *when approved* by an administrative agency set up to administer the industry statute,[8] is not such approval the only way of denying full application of the antitrust statutes and complete availability of their remedies? Does the mere existence of a power to exempt have the same effect as an exemption granted under the power? Can *United States v. Borden Co.*, 308 US 188, 197ff be ignored?

4. When the only possible issues involved in the claim for *damages* under the antitrust statutes on account of past conduct are (a) whether an agreement to fix rates was made, (b) whether

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8. Shipping Act, § 15, App. p. 5ff.

it was carried out to plaintiff's damage and (c) whether it was in fact not filed with and not approved by the Federal Maritime Commission, are not these antitrust issues for the court and not questions for the agency charged with administration of the Shipping Act?

5. Are not *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 US 474 and *Far East Conference v. United States*, 342 US 570, whether rightly or wrongly decided, to be restricted to their own facts, and restricted to their holding that judicial relief *in specie*, with prospective operation which well *may interfere with the proper function of an administrative agency* in the sphere committed to it by Congress, will be withheld till the result of administrative action is seen? Are they not without application where all that is sought is a judicial award of damages for illegal past conduct *which no administrative action can now cure* and where the awarding of damages by a court will no more interfere with the regulatory scheme and the functioning of the agency set up to administer it *than would an award of reparations by the agency itself?* Is not this case within the reservation from operation of the primary jurisdiction rule spelled out in *Pan-American World Airways, Inc. v. United States*, 371 US 296, 304?

6. Is not the case a simple one of an overcharge of $2.50 a ton made illegal because imposed as the result of a price fixing agreement which, being unapproved so as to exempt it, violated the antitrust statutes and is it not a case typical of cases appropriate for judicial disposition under Clayton Act § 4?

7. In any event was it not error to dismiss rather than to hold waiting agency action if any such action was required?

VI.

STATEMENT OF THE CASE

A. Proceedings Below

Carnation Company commenced this action against 2 steamship "conferences" of water carriers operating from the United States

to the Far East, the members of those conferences and the Chairman of each conference, to recover treble damages under the Sherman Act and the Clayton Act for violations, by the defendants, of these acts. **The complaint** (R 9-25) shows: Plaintiff sold evaporated milk in foreign commerce,, and shipped it from Pacific Coast ports to Manila. The members of defendant Pacific Westbound Conference (PWC) were the only carriers providing regular berth service from Pacific Coast to the Far East. Plaintiff was required to use their service. The defendants (PWC, its members and others) entered into a conspiracy and agreement to fix the rates for that service and carried out that conspiracy. This agreement was never approved under the Shipping Act. As a result, over plaintiff's protest, on May 1, 1957, the theretofore lawfully fixed rates were increased $2.50 per ton, a request by plaintiff, in November, 1957, to reduce the rates to what they had been before this increase was denied and the $2.50 per ton increase was kept in effect until May 7, 1962. The plaintiff did not pass on this increase to its customers and, as a result, it was damaged in the amount of $343,276.70 which it seeks to recover, trebled, as provided in the Antitrust Statutes, together with a reasonable attorney's fee and costs.

The jurisdiction of the District Court was invoked under §§ 1 and 2 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, §§ 1 and 2, 15 USC §§ 1, 2), § 4 of the Clayton Act (Act of Oct. 15, 1914, c. 323, 38 Stat. 731, § 4, 15 USC § 15) and §§ 1331, as amended, and 1337 of the Judicial Code (28 USC §§ 1331, as amended, and 1337). (R 12)

Proceedings on motions to dismiss were the only proceedings had. All of the defendants, except one,[9] before any other proceedings were had, appeared by motions to dismiss and have raised no factual issue. The Federal Maritime Commission, permitted to intervene for the same purpose, filed an answer which created

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9. James A. Dennean, Chairman of the Far East Conference. He was not served. Certain parties, joined as defendants by mistake, were dismissed by agreement.

no factual issue[10] and moved to dismiss. The defendants and intervener, for good reason,[10] have elected to proceed without creating issues of fact.

The Far East Conference (FEC) and members and former members **moved to dismiss** the action (R 26-29) upon the grounds that the complaint failed to state a claim upon which relief could be granted in that its charges constitute "violations of the provisions of the Shipping Act, 1916, as amended, which, to the extent of said acts and charges, supersedes the antitrust laws * * * the remedy * * * is that afforded by the Shipping Act, 1916, as amended" and the court "is without jurisdiction of the subject matter" in that agreements about rates are within the "exclusive jurisdiction of the Federal Maritime Commission"; the acts of defendants are subject to the jurisdiction, supervision and regulation of that Commission which is authorized to afford a remedy and there is pending a proceeding before the Commission in which the plaintiff has intervened and in which substantially the same issues will be decided.

Pacific Westbound Conference (PWC), defendant Galloway, its chairman, and its members appeared by **motion to dismiss** (R 30-32) on the ground that the Shipping Act, 1916, as amended "provides the exclusive remedy for each and every wrong alleged by said complaint and that, as a consequence this Court is without jurisdiction to proceed as the matter is subject to the exclusive primary jurisdiction of the Federal Maritime Commission."

The Federal Maritime Commission moved to intervene "as a defendant * * * for the purpose of moving this court to dismiss" and submitted a **motion to dismiss** on the ground that the Shipping Act, 1916, "provides the exclusive remedy for the wrongs alleged in the complaint and therefore this honorable Court is without jurisdiction in this matter." (R 33-36)

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10. See footnote 2 above. See proceedings before the Commission, see Part IX, below.

With their motions, PWC and the Commission submitted the affidavit of Thomas Lisi, Secretary, Federal Maritime Commission (R 37-59). Its principal contribution was to supply, as Exhibit 5, a copy of "Agreement 8200". (R 45-59)

Plaintiff objected to intervention (R 60-62).

The court granted the Commission's application to intervene and ordered further argument. (R 108, 109) The court then filed a **memorandum opinion and order** (137, 138) **granting the motions to dismiss** on the ground that the Shipping Act "provides a remedy for any violation of the Act", that "to carry out a rate agreement between carriers before approval of the Commission is an unlawful violation of the Act", this issue is tendered by plaintiff's complaint, the Supreme Court "has held that the antitrust laws are superseded to the extent that the Shipping Act provides a remedy" and authorities cited "are well-established precedents for applying the doctrine of exclusive primary jurisdiction to the Shipping Act in the present case."

Judgment (R 138, 139) accordingly was entered that

> "the court having filed herein a Memorandum of Opinion granting said Motions to Dismiss on the ground that primary jurisdiction of the action is in the Federal Maritime Commission:
>
> IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's action be, and the same is hereby dismissed."

On appeal to the United States Court of Appeals for the Ninth Circuit (R 140-147) the judgment of the District Court was affirmed (R 157-188) and a petition for rehearing (R 188-199) was denied (R 200, 201). (Part III, p. 4 above.)

B. The Facts

The facts appear from Petitioner's Complaint (R 9-25) and the Lisi affidavit, particularly its Exhibit 5, Agreement No. 8200 (R 37-59),[11] and are undisputed.[12] These are the facts:[13]

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11. The only other matter dealt with was by some references to proceedings, instituted by the Commission on its own motion, looking

Carnation Company, was a shipper of evaporated milk in foreign commerce from the Pacific Coast to the Philippine Islands by defendant common carriers by water, members of defendant Pacific Westbound Conference (PWC) (par. 4, 5, 29).

Defendant common carriers from the United States to the Far East (par. 4, 6-8) fell into 3 groups, (1) those operating only from Pacific Coast ports (par. 6), (2) those operating only from the Atlantic Coast and/or Gulf of Mexico ports (par. 7), and (3) those operating both from Atlantic Coast and/or Gulf ports and from Pacific Coast ports (par. 8). Those operating from Pacific Coast ports (members of PWC) were the only carriers providing general cargo and regular berth service on substantially regular routes and with regular sailing from Pacific Coast ports of the United States to the Far East and were the only carriers by whom the plaintiff could ship to Manila (par. 11, 29).

Before January 1953 these carriers from Pacific Coast ports to the Far East associated themselves together under Pacific Westbound Conference Agreement No. 57 to form the Pacific Westbound Conference for the purpose, among other things, "of

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into some of the conduct of the carriers after approval of Agreement No. 8200. Carnation appeared but asked no monetary relief and hence none could be awarded since the proceeding was on the Commission's own motion. (Shipping Act § 22 (last paragraph), App. p. 13). The statement of the Court of Appeals of the effect of § 22 is not as full as it should be although it quotes § 22 in full in note 4.

12. On the motions to dismiss the undenied averments of the Complaint must be taken as true. (*Radovich v. National Football League*, 352 US 445, 448; *United States v. New Wrinkle, Inc.*, 342 US 371, 376; *Collins v. Hardyman*, 341 US 651, 652; *McCleneghan v. Union Stock Yards Co.*, 298 F 2d 659, 662 (Cir. 8)) and compare the Commission Report. See Part IX below.

If we labor the point unduly it is because it is believed, with deference, that the rule was ignored by the Court of Appeals; indeed that the Court of Appeals was persuaded to its conclusion, in part, because it had undertaken to pass on the facts and thought that they were other than as stated in undenied averments of the Complaint. (See R 184) We are not saying anything that has not been said to the Court of Appeals itself. (R 197-199)

13. Paragraph references are to the Complaint (R 9-25). And compare the Commission Report. See Part IX below.

fixing, by tariffs by and through said association and conference, the rates at which the members of said association and conference would serve said trade by transporation of commodities in said trade and commerce." Agreement No. 57 "provided *that PWC should fix the rates and issue a tariff thereof.*" The Agreement was filed with, and approved by, the United States Shipping Board under Shipping Act, 1916, § 15.[14] Thereafter those rates "were fixed by PWC[15] acting agreeably to and under said Agreement No. 57," except as stated below. Only carriers operating from Pacific Coast ports were members of PWC. (Par. 9) No carrier operating only from Pacific Coast ports was a member of the Far East Conference (FEC). (Par. 10)

Before January 1953 the carriers from the Atlantic and Gulf ports to the Far East formed the Far East Conference (FEC) for the purpose, among other things, of fixing rates to be charged by its members. Only carriers operating from Atlantic or Gulf ports were members of FEC. No carrier operating from only Atlantic and/or Gulf Ports was a member of PWC. (Par. 13) "[A]t no time was" FEC "lawfully authorized or empowered to fix any rates from Pacific Coast ports of the United States nor was it agreed that it should have any part in fixing said rates except as averred in paragraph 18 below" (the secret side agreement presently to be referred to) (par. 14).

Carriers operating from Atlantic or Gulf ports and Pacific ports were members of both Conferences. (Par. 9, 13)

Trade from the Atlantic and Gulf to the Far East was competitive with that from the Pacific Coast. PWC and FEC served

14. From time to time different agencies, by statute or executive order, have been charged with administering the Act. The present agency is the Federal Maritime Commission. By the use of "Commission" we refer to it and its predecessors. The details of the changes are given in a note to 46 USCA § 1111 (main volume and pocket part). *See FMB v. Isbrandtsen Co.*, 356 US 481, 482 n. 1.

15. "Its business was and is, among other things, that * * * of fixing rates for such service by its members" (par. 12).

different trades that were competitive and their services were competitive except as restrained as stated below (Par. 16).

Under date of November 5, 1952 parties who were members of PWC, designating themselves as such, and parties who were members of FEC, designating themselves as such (R 50-59), entered into a written agreement known as Agreement No. 8200 (R 45-59), approved by the Federal Maritime Board on December 29, 1952 (R 18, 19, 45). It is of importance, particularly in the light of comments of the court below, to notice the precise terms of that agreement. It is in two parts, four paragraphs of recitals, numbered 1-4, and eight paragraphs of contractual terms, designated First through Eight. The recitals are important because they provide a dictionary of terms used in the other provisions.

Recital, par. 1, states that "Pacific Lines" are parties to "Federal Maritime Board Agreement No. 57, as amended, which designates the parties thereto as Pacific Westbound Conference" and says that

> "whenever reference is hereinafter made to action which is required or permitted to be taken by the Pacific Lines, such reference is intended to refer to action such as is required to effect the *establishment or change of rates pursuant to said Agreement No. 57,* as amended." (R 46)

Paragraph 2 identifies the "Atlantic/Gulf Lines" as parties to "Agreement No. 17, as amended, which designates the parties thereto as the Far East Conference" and recites that

> "whenever reference is hereafter made to action which is required or permitted to be taken by the Atlantic/Gulf Lines, such reference is intended to refer to action such as is required to effect *the establishment or change of rates pursuant to said Agreement No. 17,* as amended."

Language could not make it clearer that when "reference is hereinafter made to action which is required or permitted to be taken" by the conferences the reference is to action by the respective con-

ferences each acting separately under its own conference agreement.[16] There is nothing elsewhere in the agreement to the contrary.

Par. 4 recites that "the purpose which the parties desire to accomplish * * * is to assure * * * stability of ocean rates and frequency, regularity and dependability of service" and that to this end

> "it is essential that the parties [16] shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates". (R. 47)

Reading this with paragraphs 1 and 2 it means no more than it is desirable that "the parties shall, from time to time, establish the rates to be charged" by "action such as is required to effect the establishment or change of rates pursuant to" their said respective conference agreements, No. 57 and No. 17 (pars. 1 and 2). It is a recitation and *not a contractual provision.*

So far as we are concerned with them the contractual provisions then provide:

FIRST: After approval of the agreement the parties shall hold an "initial meeting" at a time specified. All matters coming before "the *initial* meeting" shall be determined only by a concurrence of the member lines, each "acting as a group * * * in accordance with the procedures prescribed by its respective Conference Agreement with respect to the establishment or change of rates.[16] The initial meeting shall make rules, *not inconsistent*

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16. Senate Report No. 860, Aug. 31, 1961 [To accompany H.R. 6775] considering the proposed 1961 amendments of Shipping Act, 1916 (2 U.S. Code Congressional and Administrative News, 87th Congress, First Session, 1961, p. 3108 at p. 3123) specifically noticing FMB No. 8200 said: "Under the Far East Conference/Pacific Westbound Conference joint agreement each conference retains the right of independent action." The Solicitor General, in his Memorandum herein for FMC, p. 2, likewise recognizes the reservation of right of independent action in Agreement No. 8200.

It is the "parties" who shall act, not some super-conference.

with the provisions of this agreement, for the conduct of all meetings to be held hereafter and for the transaction of such other business as the parties may be permitted to conduct by virtue hereof, including the *provision of machinery* for the change of any rates, rules or regulations adopted at the initial meeting or at any subsequent meeting."

There is nothing here suggestive of a new super-rate-making conference. There is nothing here to suggest that as "to action which is required or permitted to be taken" by either conference, it is to be taken otherwise than by "action such as is required to affect the establishment of change of rates pursuant to" the respective conference agreements of each conference. The matter is taken beyond the realm of argument by the next provision of the agreement:

> "SECOND: Anything contained herein or in the rules and regulations adopted at the initial meeting as from time to time amended to the contrary notwithstanding, if either group of Lines should determine that conditions affecting its operations require an immediate change in its tariffs, it may notify the other group thereof, specifying the changes which it proposes to put into effect 48 hours after the giving of such notice if given by telegram or 72 hours after the giving of such notice if given by air mail, and a summary of the facts which justify the changes on said short notice. Forty-eight hours, or 72 hours, after the giving of such notice, dependent upon the medium by which such notice shall have been given, the notifying group may make such changes as stated in said notice and the other group may, at the end of 48 hours, or at the end of 72 hours, as the case may be, after the giving of such notice, make such changes in its tariffs as it may see fit and the action of the groups so taken shall not constitute a breach or violation of this agreement. The parties shall, however, promptly give to the Governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, copies of any notices and information with respect to any

changes in tariffs given or made as provided for in this Article SECOND."[16]

Nowhere is there a suggestion that the rate making functions conferred by Agreement No. 57 upon PWC, for its members, are taken away from that conference or that the independent action of PWC under its own conference agreement is subjected to the veto of the conference of the competitors of its members. Nowhere is there a suggestion of super-conference rates or tariffs. The tariffs contemplated are those of each conference. If they are to be changed they are to be changed by each conference, not by a super-conference, and notice to the other is necessary only in the case of "an *immediate* change".

In spite of the provisions of Agreements Nos. 57 and 8200 that PWC should be the rate fixing agency for its members and its tariffs the defendants, in January 1953, met at Santa Barbara, California, and "secretly and unlawfully associated themselves together and secretly and unlawfully combined, conspired and agreed to restrain commerce with foreign nations" and to fix the rates of members of PWC from Pacific Coast ports to the Far East, not as provided in Agreements No. 57 and 8200, and so conspiring agreed not to disclose to shippers information with respect to rate changes;[17] that defendants, and not PWC alone, should fix the rates for PWC members but that the rates so fixed should "then be given out and to shippers by defendant PWC falsely pretending to act as such and under Agreement No. 57";[17] that these rates would be adhered to and that PWC would make no change in

17. The court below seemed to be mystified by these charges of secrecy but the parties had no trouble in recognizing that they were aimed at a possible statute of limitations question. (*Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F2d 80 (Cir. 2), cert den. 368 US 821; *Westinghouse Electric Corp. v. Pacific Gas & Elec. Co.*, 326 F2d 575 (Cir. 9) an "electrical industry case" citing 4 earlier such cases by the Courts of Appeal for the 2nd, 7th, 8th, and 10th Circuits and noting the denials of certiori; *Westinghouse Elec. Corp. v. Burlington*, 326 F2d 691 (Cir. Dist. Col.); *General Electric Co. v. San Antonio*, 334 F2d 480 (Cir. 5))

any rate without the concurrence of FEC, except rates on a "list of initiative items" which did not include evaporated milk until May, 1961. (Par. 18, 19) This agreement and association, combination and conspiracy was never submitted to the Commission and was never approved (par. 20).

In 1951 PWC, the lawful rate fixing agency for rates for carriage by water from our Pacific Coast ports to the Far East, under Agreement No. 57, had fixed the rate for evaporated milk from Pacific Coast ports to the Philippine Islands. The defendants, under the secret and unapproved side agreement above stated, increased this rate by $2.50 per ton effective May 1, 1957. PWC, concealing this and pretending to act under Agreement No. 57, announced the increase and, over plaintiff's protest, put it into effect, as though it were an increase by PWC.[18] This rate was kept in effect until May 7, 1962. Meanwhile, in November 1957,

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18. The complaint alleged that the defendants, acting under the unapproved secret agreement "agreed that the rates * * * for evaporated milk should be increased by $2.50 per ton and that defendant PWC, pretending to act agreeably to the provisions of said Agreement No. 57, should state and circulate said increase" (par. 22) and that, in fact, it did so and in so doing defendants "falsely pretended that PWC was acting lawfully and agreeably to said Agreement No. 57" while in truth "defendants were acting agreeably and pursuant to said unlawful combination, conspiracy and agreement" (par. 23).

The significance of the way the parties acted has not escaped respondents. The FEC brief in opposition to the petition for certiorari, p. 4, states: "There is no assertion that the PWC rate which petitioner paid between May of 1957 and May of 1962 was not the rate set forth in the PWC tariffs". *That is correct.* That is where the rate was set forth. The *defendants* never purported to issue any rate or any joint rate *under Agreement No. 8200.* They never represented or asserted that they had any authority under Agreement No. 8200 to fix rates jointly, or that any rates fixed were joint rates or that any rates were established as the result of joint action under No. 8200. To the contrary, they always held themselves out as separate conferences of competing carriers each conference fixing its own conference rates for its members. It is too late for them now to claim that the actual way in which the rates were fixed was proper because authorized by No. 8200 or that they were acting under or within No. 8200. Cf. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 US 211, 215 where the impropriety of joint action was emphasized because "respondents hold themselves out as competitors".

plaintiff requested PWC to reduce the rate by $2.50 per ton to the rate it had established before May 1, 1957. PWC determined that the request should be granted[19] but would not reduce the rate without the concurrence of FEC. FEC declined concurrence[19] *and for that reason*[20] the rate was not, in fact, reduced until May 7, 1962, when the rate was reduced to the rate originally fixed by PWC. (Par. 21-28)

From May 1, 1957 through May 7, 1962 plaintiff was forced to ship its evaporated milk to Manila by members of PWC and to pay the increase in rate of $2.50 per ton. It did not pass this increase on and, as a result, suffered actual damage in the sum of $343,276.70. (Par. 29, 30)

In 1959 the Commission instituted an investigation into Agreement 8200 and conduct in relation to it. Carnation Co. intervened but, quite obviously, no issues here presented could be concluded there,—the Commission is given no power to adjudicate anti-trust questions as such,—Carnation did not ask for reparations and monetary relief could not be awarded (see note 11 above), much less any relief by way of treble damages. What general questions

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19. Respondents are not in the dark as to what was done. The FEC brief in opposition to the petition for certiorari, p. 4, states that *"PWC decided to reduce its evaporated milk rate* by $2.50 per ton. PWC requested the concurrence of FEC in said reduction. FEC declined concurrence."

20. The Complaint (par. 25) avers that "defendant PWC thereupon, and agreeably to the association, combination, conspiracy and agreement hereinabove averred in paragraph 18, withdrew its said request for concurrence and no reduction in said rates was made." It is further averred that PWC falsified in writing the reason for the denial of Carnation's request for a reduction when it "then knew, *and it was the fact*, that plaintiff's said request for reduction of rates, as aforesaid, was declined by reason of the refusal of defendant FEC to concur in the said reduction." (Par. 26, R 23) The Commission characterized the course of conduct as a sham (see App. p. 63).

In the face of these undenied averments it is very difficult to understand how the court below could have suggested that perhaps, as an isolated matter, and independently exercising its discretion, PWC was merely waiving its right to take independent action (R 184). We suggest, with deference, that the court was very hard put to justify its result.

the Commission may have gone into is not here a matte
concern. The antitrust violation here complained of, price fi
is a *per se* violation. Carnation is not concerned with, and
not tendered, questions of discrimination, reasonableness or
like. The Court of Appeals made some attempt to use the Ex
iner's report in the Commission proceeding. In Part IX be
we ask leave to call attention to the Commission Report, rend
since preparation of this Brief began.

The claim presented by Petitioner Carnation is a very sir
one. Before 1953, PWC, acting lawfully under Agreement
57 had established the lawful rates for carriage by water f
Pacific Coast ports to the Far East. In 1952 PWC and
entered into Agreement No 8200, approved under Shipping
1916, under which PWC "retained the right of indepen
action" in fixing rates (note 16 above). But in January of 195
Santa Barbara, California, the defendants, Agreements No
and No. 8200 to the contrary notwithstanding, secretly ag
that these rates should not be so fixed by PWC but woul
fixed by the defendants under their secret agreement. (R 19,
As a result, and under this secret agreement, the lawful
which PWC had fixed, and applicable to Petitioner's shipm
was increased $2.50 per ton. This increase, an overcharge
the rate lawfully fixed by PWC, was illegal because fixed
suant to an agreement unlawful under the Sherman Act.
tioner sues to recover this unlawful overcharge (trebled).

In the circumstances the relief awarded to shippers suin
recover this overcharge could not vary,—it must be fixed at $
per ton. The recovery under Clayton Act § 4 could not pos
interfere with the administration of any regulatory scheme u
Shipping Act, 1916 any more that application for relief u
that Act because it would be exactly the same as relief on a
cation to the Commission for an order for reparation u
Shipping Act, 1916 § 22 (the order as such is not enforcea
and court award under § 30 (after jury trial and with an av

of a reasonable attorney's fee)[21] except that the compensatory aspect of the relief would be trebled.

The case presents no claim of "discrimination", "prejudice" undue or otherwise, "unfairness", "unreasonableness", "unjustness" or calling for the exercise of administrative expertise or discretion in application of any other standard, resolution of fact or framing of relief.

VII.

SUMMARY OF ARGUMENT

PWC was the authorized agency, under Shipping Act, 1916, for fixing rates for common carriage by water from Pacific Coast ports of the United States to Manila. It had properly established such rates. Thereafter, pursuant to an agreement between it and its members and others, unapproved under Shipping Act, 1916, § 15, and hence not exempted from application of the antitrust statutes by the exempting provision of Shipping Act, 1916, the rate on evaporated milk was increased $2.50 per ton. Petitioner, as a shipper of evaporated milk from Pacific Coast ports to Manila was forced to pay the increased rate. In the circumstances, if the antitrust statutes stood alone, under Clayton Act, § 4, it was entitled to sue and recover three-fold damages. (Pp. 6 above, 27 ff below)

It is said that this action cannot be maintained, however, because of Shipping Act, 1916, at least in advance of determination by Federal Maritime Commission of various issues involved (just what is not clear) favorably to petitioner. There is thus presented a question of accommodation of the underlying policy and terms of the antitrust statutes with the terms and policy of Shipping Act, 1916, relating to common carriage by water in foreign commerce and of accommodation of the proper function of the courts, upon the one hand, with those of the Commission upon the other, where possible Shipping Act questions are involved. For the resolution of these questions the basic materials are the terms

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21. See pp. 38, 56-59 below.

and policies of the statutes. (P. 2 above, p. 26ff below, p. 48ff below.)

The Sherman Act provisions, §§ 1 and 2, prohibiting combinations in restraint of trade and monopoly or attempts to monopolize, are statements of "broad anti-trust policies" resting on the premise that unrestricted interaction of competitive forces yields the best allocation of our economic resources and are aimed at preserving free and unfettered competition as the rule of trade as opposed to the alternatives of cartelization or governmental regulation. The underlying policy gives the provisions such force that immunity is not ~~likely~~ implied. Civil and criminal sanctions are imposed. Not the least of these is the provision of Clayton Act, § 4, that any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue and recover threefold the damages sustained. This provision is designed not merely to provide compensation for damages suffered but is designed to reinforce the broad social object of the Sherman Act by imposing punishment for unlawful conduct and by supplementing government enforcement of the antitrust laws by calling out private litigants as additional enforcement agencies. Action for treble damages under Clayton Act § 4 is not to be looked upon, therefore, as an ordinary piece of civil litigation for damages. Upon the other hand, Clayton Act § 4 does provide for an action to compensate those injured by Sherman Act violations and the full measure of recovery to which the plaintiff is entitled under the statute is the damages he has suffered, trebled. (Pp. 27-32.) This is relief that cannot be had under the Shipping Act, 1916.

In the background of Shipping Act, 1916, were threats to common carriers by water posed by antitrust litigation and the existence of industry abuses. As a result, the statute was adopted prohibiting certain abuses, specifying a limited number of standards of conduct in areas other than rate fixing, providing for administration of the statute by an agency but deliberately staying away from rate fixing or giving that agency power to fix rates

and, as the central scheme of regulation, providing for industry self-regulation through agreements submitted to and approved by the administrative agency and expressly exempting from operation of the antitrust statutes agreements and arrangements so approved. (P. 33 ff.) The scheme for common carriage by water in *foreign* commerce is in sharp contrast with the detailed and all-pervasive statutory scheme of regulation for common carriage by water in *interstate* commerce finally spelled out for interstate commerce in Part III of the Interstate Commerce Act (Transportation Act of 1940). Particularly the absence by design of rate regulation under Shipping Act, 1916, by force of the statute itself or by the Commission, is in marked contrast with the very full provision for rate regulation of interstate common carriage by water in Part III of the Interstate Commerce Act, modeled after the earlier provisions in Part I regulating carriers by railroad. (Pp. 33-48.)

Congress made no attempt to accommodate the anti-trust statutes and the Shipping Act, 1916, by expressly providing for *pro tanto* repeal ~~of~~ in the Shipping Act or by general excepting provisions in the Shipping Act. Nor is the case a proper one for the courts to attempt such an accommodation by resorting to the doctrine of implied repeal. Effect should be given, if possible, to both statutes and there is no such positive repugnancy between the two that application of the earlier antitrust statutes would render the provisions of the Shipping Act nugatory. The proposition is well supported by the decisions of this court which, repeatedly, have been called upon to consider the matter of accommodation of the antitrust statutes with industry regulatory statutes. (Pp. 48-62 below.) To the contrary, Congress provided a method of accommodation of the antitrust statutes with the Shipping Act on a case by case basis by providing, § 15 of the Shipping Act, that agreements under that section presented to, and approved by the Commission, were exempted from the provisions of the antitrust statutes. It thus provided for a method of accommodation that should be made not in the abstract and in general but in the light

of the specifics of the precise problem presented and provided machinery by which that accommodation could be adjusted and fitted so as to reconcile, in terms of concrete problems, the operation of the schemes of the antitrust statutes and the industry regulatory statute. Where this method of accommodation is appealed to, and approval is given, the matter approved is exempted from operation of the antitrust statutes. But where Congress has thus expressed the method of exemption from the antitrust statutes exemption can be obtained only in this way and when it is not so obtained the antitrust statutes apply. This rule, and the leading decision announcing it, *United States v. Borden Co.*, 308 US 188, control here. (See pp. 62-67, below.)

It is argued, however, that even if the statutes can be reconciled nevertheless given conduct may fall under both and, this being the situation here, the questions which are raised, upon a proper division of functions between Commission and courts, should first be submitted to the Commission for decision and, until it has acted, no action can be maintained in a District Court. The doctrine appealed to is the so-called primary jurisdiction doctrine designed to accommodate the complimentary roles of courts and administrative agencies and to permit the administrative agency to act in the first instance when this is necessary for the protection of the integrity of the industry regulatory scheme and where the questions involved call for the employment of the special competency of the administrative agency. But that doctrine is to be applied only where the circumstances provide the reasons which gave birth to, have shaped the course of development of, and continue to support, the primary jurisdiction doctrine. Where, as here, the questions of fact are only those usual, and familiar to courts, in antitrust litigation, the principal question presented is a question of law and relief by a money award under Clayton Act § 4 will no more disturb the operation of the regulatory scheme of the Shipping Act than would a money award under §§ 22 and 30 of the Shipping Act itself, there is no room for operation of the

primary jurisdiction doctrine and courts should proceed to perform their proper functions by entertaining proceedings under Clayton Act § 4 to the end that antitrust policy, whose enforcement Congress has entrusted to the courts, is not, in practical effect, taken over by an administrative agency. (Pp. 67-80 below.)

To support the argument that dismissal of this Clayton Act § 4 action was proper *U. S. Navigation Co. v. Cunard SS Co.,* 284 US 474 and *Far East Conference v. United States,* 342 US 570 are relied upon. When those cases are read with the other primary jurisdiction cases and are read particularly with *Federal Maritime Board v. Isbrandtsen Co.,* 356 US 481 and *Pan American World Airways v. United States,* 371 US 296, it is apparent that to the extent they may have any vitality it is confined to support of the proposition that an application to courts for *injunctive* relief, with prospective operation *in specie,* which can well interfere with the proper operation of an industry regulatory statute and the functions of an administrative agency under it, will not be granted in advance of administrative action; that these cases will not support application of the primary jurisdiction doctrine when the sole issue is that of compensation for injury from past wrongdoing or punishment for past criminal conduct. (Pp. 80-92 below.) To the contrary, the decisions which are controlling here are *United States v. Borden Co.,* 308 US 188 and *Great Northern R. Co. v. Merchants Elevator Co.,* 259 US 285, holding that where Congress has stated the test for exemption from the antitrust statutes and it has not been met, where there are no questions of fact peculiar to the industry, requiring for their resolution special competency and special knowledge of the industry, and where the ultimate result does not call for the exercise of administrative discretion but is to be determined by the application of a rule of law, immediate functioning of the courts is not to be delayed by resort to an administrative agency; there is no proper room for operation of the primary jurisdiction doctrine. (Pp. 92-95 below.)

The court below was in error in dismissing the action when it presented no matter upon which administrative action could be determinative and where the court alone, under Clayton Act § 4, could give the full measure of relief (treble damages) to which the petitioner was entitled.

VIII.

ARGUMENT

Carriers by water so combined to raise the rates Petitioner was required to pay that Petitioner, without question, could have relief under the antitrust statutes if their's were the only voice that spoke (p. 6, above). But it is urged that for carriage by water in foreign commerce the Shipping Act, 1916, has set up a scheme of regulation and that, though that statute has provided its own test as to when carrier's agreements shall be excepted from operation of the antitrust statutes (by Commission approval), still, even when this test cannot be met, carrier conduct is exempted from application of the antitrust statutes, and remedies that they provide are not available, because the scheme of the antitrust statutes cannot operate in an atmosphere where, by another statute, there is an industry regulatory scheme. So the question for decision is, are these two statutory programs such that, in this case, each can have its own field of play, under the test Congress has provided, or is the scheme of regulation of the Shipping Act, 1916, so complete that even though its expressed method for eliminating operation of the antitrust statutes has not been appealed to still operation of the antitrust statutes is excluded? Congress has said how operation of the antitrust statutes can be avoided in the industry to which the Shipping Act, 1916, applies. (Pp. 37, 62 ff.) Can the courts say that this was a waste of breath because the antitrust statutes could not apply anyway? Does one statute give way to the other, in whole or in part, or has Congress provided the method of reconciliation so that both can apply in full force in a case such as this except only that a private suitor can not elect more than one remedy and can not have more than a single satisfaction of his rights?

It is a self-evident truism that for the solution of this problem of accommodation the materials are the statutes and the nature and force of the policies underlying them.

A. The Antitrust Laws and Their Policy

The terms and policy of the antitrust laws, so far as material here, are comparatively easy of statement.

Sherman Act § 1 makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations". (Under this provision price fixing arrangements, including those of regulated common carriers, are illegal *per se* (p. 6 above).) Sherman Act § 2 makes everyone "who shall monopolize, or attempt to monopolize, or combine or conspire * * * to monopolize" interstate or foreign trade or commerce guilty of a misdemeanor.

Northern Pac. R. Co. v. United States, 356 US 1, 4, shortly and sweepingly stated the policy of the Sherman Act:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestricted interaction of competitive forces would yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even where that premise is open to question, the policy unequivocally laid down by the Act is competition."[22]

These statutes represent the statement of "broad anti-trust policies laid down by Congress" (*United States v. DuPont de*

22. *U. S. v. Philadelphia Nat. Bk.*, 374 US 321, after quoting *California v. Fed. Power Com'n*, 369 US 482, 485 for the proposition that "[i]mmunity from the antitrust laws is not lightly implied" adds "This canon of construction which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here."

Nemours & Co., 353 US 586, 590; cf *Allen Bradley* in note 23 below) and

> "Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regulation of large portions of the economy." (*United States v. Philadelphia Nat. Bk.*, 374 US 321, 372).

The underlying policy gives the statute such force that "immunity from the antitrust laws is not lightly implied"[23] and agreeably to this precept this Court has said that its "function is to see that the policy entrusted to the courts is not frustrated by an administrative agency." (*California v. Fed. P. Com'n*, 369 US 482, 485, 490[24])

In a somewhat different context *The American Ship Building Co. v. N.L.R.B.*, 379 US 814 repeated that exercise of the judicial function properly must be employed:

> "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

Congress has not left the provisions of the Sherman Act as lifeless monuments to pious solicitude and hope. It has provided

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23. *U. S. v. Philadelphia Nat. Bk.*, 374 US 321, quoting this statement (see note 22 above), said that "[i]t is settled law". *Allen Bradley Co. v. Local Union No. 3*, 325 US 797, 809, referring to the antitrust statutes, and holding the union exemption did not apply, points out: "It must be remembered that the exemptions granted to the unions were special exceptions to a general legislative plan."

24. Immunity is "not lightly to be inferred from the enactment of a regulatory statute" (*Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 606 (Cir. 2), cert. granted and then dismissed as improvidently granted 380 US 248). Compare holding that courts should not shirk the performance of their own functions by referrals, *Southwestern S. & P. Co. v. River Terminal Corp.*, 360 US 411, 414; *New York, Susquehanna etc. Co. v. Follmer*, 254 F.2d 510 (Cir. 3) calling attention to the canon of judicial function expressed in *La Buy v. Howes Leather Co.*, 352 US 249. Cf. *Packaged Programs Inc. v. Westinghouse Broadcasting Co.*, 255 F 2d 708 (Cir. 3).

sanctions to make the Act a viable and impelling standard of business conduct. Violations are made crimes (§§ 1 and 2 (15 USC §§ 1, 2)) and may result in forfeiture of property (§ 6, 15 USC § 6). Through the intervention of the Department of Justice the processes of courts of equity are to be invoked to compel compliance (§§ 4, 5, 15 USC §§ 4, 5). The Government can sue for compensation when violations hurt it in the conduct of its own affairs (Clayton Act § 4A, Act of July 7, 1955, c. 283, § 1, 69 Stat. 282, 15 USC §§ 15a and compare Clayton Act § 11, 15 USC § 21). Private litigants can have the help of equity (Clayton Act § 17, 15 USC § 26). More important for this case, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained". (Clayton Act § 4, 15 USC §15)

This Clayton Act § 4 private right of action for treble damages is more than a provision for compensation for damage suffered by a private suitor. It has a large role of support of the underlying policy of the Sherman Act.

The "punitive two-thirds portion of a treble-damage antitrust recovery" is "extracted from the wrongdoers as *punishment* for unlawful conduct" (*Commissioner v. Glenshaw Glass Co.*, 348 US 426, 427, 431).[25] "The treble-damage action was intended *not* merely to redress injury to an individual through the prohibited practices, *but to aid in achieving the broad social object of the statute.*" (*Karseal Corp. v. Richfield Oil Corp.*, 221 F2d 358, 365 (Cir. 9)[26]) It does more than merely provide an added sanction

25. Cf. *Powell v. St. Louis Dairy Co.*, 276 F2d 464 (Cir. 8); *No. Carolina Theatres, Inc. v. Thompson*, 277 F2d 673 (Cir. 4).

26. The case was quoting *Fanchon & Marco v. Paramount Pictures*, 100 F Supp 84, 88, (S.D. Cal.) aff'd 215 F2d 167 (Cir. 9), c.d. 348 US 912. *Karseal* further said that "The Clayton Act was part of the overall plan and the 'right of the injured party to recover damages *was intended to provoke greater respect for the Act* * * *', Maltz v. Sax, 7 Cir., 1943, 134 Fed. 2d 2, 5, cert. den. 319 US 772". See the very strong opinion in

imposed on the violator. It calls out a new and different legion of enforcement agencies.[27] The Clayton Act remedy *"supplements Government enforcement of the antitrust laws."* (*U. S. v. Borden Co.*, 347 US 514, 518) The idea has also been expressed by this Court in *Lawlor v. National Screen Service Corp.*, 349 US 322, 329 and *Bruce's Juices v. American Can Co.*, 330 US 743,[28] and

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Monarch L. Ins. Co. v. Loyal etc. Co., 326 F2d 841 (Cir. 2), c.d. 376 US 952, quoting *Karseal, Mach-Tronics, Inc. v. Zirpoli*, 316 F2d 820, 824 (Cir. 9) also quoted *Karseal* and *Flintkote* and stated: "The provision for the recovery of treble damages by an injured party was an *important and significant feature of the entire antitrust program.*"

Monarch L. Ins. Co., above, is of more than usual interest because of the question presented which was one of adjustment of Sherman and Clayton Acts to state statutes regulating the insurance business in view of McCarran Act § 3(b), 15 U.S.C. § 1013 and repeal of Sherman Act § 7.

Flintkote Co. v. Lysfjord, 246 F2d 368, 398 (Cir. 9), c.d. 355 US 835 said: "Further, a niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful and restructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." See also *Olympic Ref. Co. v. Carter*, 332 F2d 260, 264 (Cir. 9), c.d. 279 US 900.

Weinberg v. Sinclair Refining Co., 48 F Supp 203, 205 (E.D. N.Y.) and *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F Supp 796, 801 (S.D. Cal.) both refer to the treble-damage action as supplying "an ancillary force of private investigators to supplement the Department of Justice in law enforcement."

27. "The grant of a claim for treble damages to the person injured was for the purpose of *multiplying the agencies which would help enforce the antitrust laws* and therefore make them more effective." (*Kinnear-Weed Corp. v. Humble etc. Co.*, 214 F2d 891, 893 (Cir. 5), c.d. 348 US 912). Compare the colorful expression of the idea in *New Jersey Wood. F. Co. v. Minneapolis M. & Mfg. Co.*, 332 F2d 346, 350 and the quotation, by this Court, on its review in that case, ... US ....., Oct. Term 1964 No. 291, May 24, 1965 of language from *Bruce's Juices*, note 28 below. *Kinnear-Weed* is quoted in *Osborn v. Sinclair Ref. Co.*, 324 F2d 566, 572 (Cir. 4). See material in note 26 above and 28 below.

28. *Lawlor v. Nat. Screen Serv. Corp.*, 349 US 322, 329, speaks of "the *public interest in* vigilant enforcement of the antitrust laws *through the instrumentality of the private treble-damage action.*"

Bruce's Juices v. American Can Co., 330 US 743, 751, speaking of treble-damage actions in connection with violations of antitrust statutes,

more recently it has said that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." (*Minnesota Mining & Mfg. Co. v. New Jersey Wood Furnishing Co.*, ... US ....., 14 L.ed 2d 405, 85 S.Ct. 1473, 1477, Oct. Term 1964 No. 291, May 24, 1965[29]) To look upon the question here presented as merely whether a claimant should seek a compensatory award under this Act or under the Shipping Act misses entirely this consideration of underlying policy and purpose.

Still the private recovery has its other side. Under the antitrust statutes, once a case of damage is made, the trebling of the amount found follows "automatically" (*Clark Oil Co. v. Phillips Pet. Co.*, 148 F2d 580, 582 (Cir. 8), c.d. 326 US 734. cf. *Trans World Airlines, Inc. v. Hughes*, quoted in note 30 below). "In this respect

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said that such an action "stimulates one set of private interests to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the government of cost of enforcement. * * * It is clear Congress intended to use private self-interests as a means of enforcement and to arm injured persons with private means to retribution when it gave to an injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee."

29. No more is required in justification of the belief of Congress than the examples to be found of the development of antitrust policy and doctrine in the decisions of this Court in private antitrust damage suits, initiated and carried through by private litigants, without prior Government action in the particular area or with regard for the particular question involved. See *W. W. Montague & Co. v. Lowry*, 193 US 38; *Thomsen v. Cayser*, 243 US 66; *Ramsay Co. v. Associated Billposters*, 260 US 501; *Binderup v. Pathe Exchange*, 263 US 291; *Story Parchment Co. v. Paterson P. P. Co.* 282 US 555; *Mandeville Island Farms v. American C. S. Co.*, 334 US 219; *Moore v. Mead's Fine Bread*, 348 US 115; *Radovich v. National Football League*, 352 US 445; *Safeway Stores, Inc. v. Vance*, 355 US 389; *Nashville Milk Co. v. Carnation Co.*, 355 US 373; *Klor's v. Broadway-Hale Stores*, 359 US 207; *Radiant Burners v. Peoples Gas etc. Co.*, 364 US 656; *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 US 690; *Silver v. New York Stock Exchange*, 373 US 341; *Simpson v. Union Oil Co.*, 377 US 13; *United Mine Workers v. Pennington*, 381 US 657, 14 L.ed. 2d 626 (Oct. Term 1964 No. 48, June 7, 1965). Cf. *Allen Bradley Co. v. Local Union No. 3 etc.*, 325 US 797 and *Dr. Miles Medical Co. v. Park & Sons*, 220 US 373.

neither the jury nor either court had any discretion." (*Bigelow v. R. K. O. Radio Pictures,* 150 F2d 877, 883 (Cir. 7), rev. on other grounds.) By consequence, and *Flintkote Co. v. Lysfjord*, 246 F2d 368, 397 ff (Cir. 9), c.d. 355 US 835, cited in note 26, so holds, if plaintiff receives anything less than his damages *trebled* he does not receive "full satisfaction of his claim"; full damages trebled, as to plaintiffs, is the "whole to which they are entitled".[30] This is pointed out because the Court of Appeals seemed to think Shipping Act § 22 bolstered the Court's holding for the reason that, so the Court thought, under § 22 the Commission could "award full reparations". It could not award the treble damages to which petitioner is entitled under the Clayton Act. (Cf. *Trans World Airlines, Inc. v. Hughes,* last paragraph of note 30.)

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30. Three cases dealing with a parallel problem, the extent to which jurisdiction of state courts to deal with disputes arising out of labor relations survives the federal legislation dealing with labor relations, are significant.

United Construction Workers etc. v. Leburnum Const. Corp., 347 US 656;

International Association etc. v. Gonzales, 356 US 617; and

International Union etc. v. Russell, 356 US 634.

Their significance is the importance they attach to the circumstance that the plaintiff could get *full recovery* (including *punitive* damages) only in the state courts, as a basis for holding that the state courts were not ousted of jurisdiction because the conduct complained of was an unfair labor practice.

In *Russell* the court said:

> "Punitive damages constitute a well-settled form of relief under the law of Alabama when there is a willful and malicious wrong. To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board. In *Laburnum* we approved a judgment that included $100,000.00 in punitive damages."

Gonzales, above, noticed that the NLRB could not have made an award "for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered".

Compare *Trans World Airlines, Inc. v. Hughes,* 332 F2d 602, 609 (Cir. 2), cert. gr. and then dismissed as improvidently granted 380 US 248, considering the Aviation Act and saying: "Moreover, the Act fails to empower the Board to grant the very relief principally sought by the plaintiff in this action—the award of money damages, treble under the mandate of the antitrust laws."

B. Shipping Act, 1916 and Foreign Commerce

In 1932 *United States Navigation Co. v. Cunard S. S. Co.*, 284 US 474, 480 said: "The Shipping Act is a comprehensive measure bearing a relation to common carriage by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." To the extent that the remark may have been justified in 1932 by the Shipping Act's regulation of *interstate* commerce it has been drained of significance by Part III of the Interstate Commerce Act, p. 45ff below. If, as to common carriage by water in *foreign* commerce, the remark means no more than that the Shipping Act, 1916 was the industry regulating statute in the generic sense in which the Interstate Commerce Act was the industry regulating statute for common carriage by land (then by railroad), the SEA is the regulatory statute for the securities business, etc. it is correct but only states the obvious and is not meaningful. If there is attempted to be read into the remark that the Shipping Act, 1916, *by its own provisions*, supplied for common carriage by water in *foreign* commerce the detailed and pervasive regulation and control that the Interstate Commerce Act provided for railroads, the attempt must fail in light of the different provisions of the two Acts and the recognition by Congress of this vast difference by removing, in 1940, regulation of *interstate* carriage by water from Shipping Act, 1916 to Part III of the Interstate Commerce Act (modeled after Part I, railroads) under the administration of the Interstate Commerce Commission, (see below p. 45ff).

The background, history and principal provisions of the Shipping Act, 1916, are reviewed in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481. It demonstrates that from the beginning Congress was aware of, and was dealing with, questions raised by the antitrust statutes. It had "long been almost universal practice for American and foreign" carriers to operate under "conference arrangements and agreements". By 1913 "it was

recognized that such agreements might run counter to the policy of the antitrust laws" (p. 487). The House, through its Alexander Committee "undertook an exhaustive inquiry" which "brought to light a number of predatory practices by shipping conferences designed to give the conferences monopolies". The result was enactment of Shipping Act, 1916. *Isbrandtsen Co.*, above, very shortly states its essence:

> "The Act does not forbid shipping conferences in foreign commerce but requires all conference agreements covering the subjects mentioned in § 15 to be submitted for Board approval. *No power to fix rates is granted to the Board.* Subject to familiar limitations, the power vested in the Board is to approve agreements not found to be unjustly or unfairly discriminatory in violation of §§ 16 and 17 or otherwise in violation of the Act. *Approved agreements are exempted from the antitrust laws.*" (P. 490)

The Shipping Act, 1916, as originally adopted had 3 principal features, (a) limited provisions regulating the industry by setting up broad standards of fair dealings and prohibiting a few of the more flagrant forms of unfair practice aimed at elimination of competition, (b) a provision for industry self-regulation by agreements when approved by the Commission and exempting such agreements from the operation of the antitrust statutes *when approved by the administrative agency* (§ 15) and (c) the creation of an agency to administer the statute and provision of some remedies.

In respect of the first of these 3 features, a matter of significance in this case, *Congress sharply distinguished between interstate and foreign commerce.* "The regulation of water carriers in the *foreign* trade of the United States is substantially different from the regulation of carriers in our *domestic* trades." (*Empire State etc. Ass'n v. FMB*, 291 F2d 336, 341 (Cir. Dist. Col.), c.d. 368 US 931.) The difference will become more apparent when the regulation of domestic carriage by water is reviewed. (See Part VIII-C, below.) For our purpose, the principal distinction is that

with respect to *foreign* commerce (unlike *interstate* commerce) the statute did not itself undertake direct regulation of rates nor confer upon the agency charged with administration of the statute power to fix rates in *foreign* commerce.[31]

The differentiation between *foreign* and *interstate* carriage starts with the first section (App. p. 2). It defines a "common carrier by water in *foreign* commerce" as one transporting between the United States and a foreign country, and one "in *interstate* commerce" as carrying between ports in the United States.

The provisions of the statute applying to *foreign* commerce, because they apply to *all* common carriers, are susceptible of summary statement.[32]

In its first aspect, direct statutory control: The statute forbids paying or allowing "deferred rebates" (§ 14 First) and the use of "fighting ships" (§ 14 Second), has a series of provisions designed to prevent preferences and discrimination[33] and requires that there be established and observed "just and reasonable regulations and practices" relating to the handling of property (§ 17). It contains only 2 provisions dealing expressly with rates: (a) no common carrier by water in foreign commerce shall demand or collect any rate which "is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States" (§ 17) and (b) obtaining carrier service at less than the regular

31. And see *Isbrandtsen Co.*, 356 US 481 quoted at p. 34 above.

32. Compare the summary statement in *Fed. Maritime Board v. Isbrandtsen Co.*, 356 US 481, 490ff.

33. § 14 prohibits retaliation against any shipper by refusing space or by other discriminating or unfair methods because the shipper patronized another carrier or filed a complaint or for any other reason, and prohibits discriminatory contracts based on volume of freight and unfair treatment or discrimination in the matter of space or other facilities, handling freight in proper condition or in the adjustment and settlement of claims. § 16 First makes it unlawful to give any undue or unreasonable preference to any person, locality or description of traffic or to subject any person, locality or description of traffic to unreasonable prejudice or disadvantage and § 16 Third makes it unlawful to induce, etc. any insurance company, etc. not to give a competitor as favorable rate of insurance on vessel or cargo as is granted to another.

rate by fraudulent means[34] or by "any other unjust or unfair device or means" is prohibited (§ 16 and § 16 Second). Power to disapprove rates, much less than to fix them, is conspicuously absent. (See *Isbrandtsen Co.*, quoted at p. 34 above.)

The second aspect of the statute, here of direct concern, is the provisions dealing with conference agreements and industry self-regulation under approved agreements, found in § 15:

> "Every common carrier by water * * * shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier * * * to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; * * *.[35]
>
> "The Commission may * * * disapprove, cancel or modify any agreement * * * that it finds to be unjustly discriminatory or unfair * * * or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.
>
> "* * * It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.
>
> "All agreements, modifications or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation."

Up to this point § 15 contemplates approved agreements regulating industry practices and placing restraints on competition. These provisions, and the policy they represent, are not completely harmonious, to say the least, with the provisions and the policies of the antitrust statutes. The question of application of the anti-

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34. As "by means of false billing, false classification, false weighing, false report of weight" etc.

35. Other subjects of agreement which might fall under the antitrust laws are here specified such as agreements giving special privileges, regulating competition, pooling agreements, allocating ports etc., etc.

trust statutes to carriage by water lay at the threshold of Congressional inquiry into the whole subject. (See *Isbrandtsen Co.*, p. 34 above.) Some form of accommodation between the Shipping Act and the policy it represents and the antitrust statutes and the policy they represent was called for. *Congress did not leave either the accommodation, or the way it should be worked out, to chance.* To the contrary, § 15 expressly provides for the method and extent of accommodation, for the section goes on:

> "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."[36]

This is the only provision which suggests that the Commission can deal with antitrust questions as such. The language that approval *excepts* from the antitrust laws *indicates that Congress contemplated that the antitrust laws remained fully operative unless an exception were granted as provided in the statute.* There would be no occasion to provide for "exception" from the antitrust statutes if other provisions of the Shipping Act superseded or repealed them, expressly or by implication.

The other provisions of the Act deal with the agency created to administer the Act. It is provided by § 22 that the Commission, either upon complaint filed with it, or on its own motion, shall investigate to determine whether there have been any violations of the Act and, in a proper case, "may direct the payment * * * of full reparation" except that it cannot, *in a proceeding on its own motion* make an order for the payment of money. This last is a curious provision if Congress contemplated that one injured by violation of the Act had his only remedy under the Act and was not free to seek redress elsewhere if, the Act aside, he had a right to do so. Congress did not think so and it denied the Commission power to force this result.

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36. Quoted from 46 USC § 814. These sections of Title 15 USC include the antitrust statutes, Sherman Act §§ 1, 2 and others and Clayton Act § 4.

The orders of the Commission are not self-executing and the Commission has no powers of enforcement. In case of an order "*other than* an order for the payment of *money*" on application to a district court, if "the court determines that the order was regularly made and duly issued, it shall *enforce obedience* thereto by writ of injunction or other proper process, mandatory or otherwise." (§ 29) In case of such orders there is no further trial of the merits of the controversy. The only open question is whether "the order was regularly made and duly issued". But there is no direct enforcement of an order *for* the payment of *money*. If such an order is not complied with "the person to whom such award was made may file in the district court * * * a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises", in such suit "the findings and order * * * shall be prima facie evidence of the facts therein stated" and if the petitioner prevails "he shall be allowed a reasonable attorney's fee". (§ 30) Here there is no direct enforcement of the order. There is a trial *de novo*[37] and, upon such trial, the parties are entitled to trial by jury.[38] (See also p. 56ff below.)

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37. *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 724 (Cir. 3, rev. on other grounds, 238 US 473) under the parallel provision of the Interstate Commerce Act, § 16(2) as amended in 1889 and the prototype of Shipping Act, 1916, § 30, pointed out that the action "is not a suit *on* the award. *qua* award, * * * but a *plenary suit for damages* actually incurred". *Missouri Pac. Ry. Co. v. V. C. E. Ferguson Sawmill Co.*, 235 Fed. 474, 478 (Cir. 8), under the parallel provision of the Interstate Commerce Act, citing *Western N. Y. etc. R. Co.*, note 38 below, specifically holds that evidence may be introduced in addition to that introduced before the Commission. *United States v. I.C.C.*, 337 US 426, 445, quoting *Meeker v. Lehigh Valley R. Co.*, 236 US 412, 430 said of ICA § 16(2) that it "only establishes a rebuttal presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury." See also *Willamette Iron etc. Works v. Baltimore & O. R., Co.*, 25 F2d 521 (D. Ore.).

38. *Western etc. R. Co. v. Penn. Ref. Co.*, 137 Fed 343, 349 (Cir. 3), aff'd 208 US 208, under the Interstate Commerce Act; *Lehigh Valley R. Co. v. Clark*, note 37 above.

"In suits at common law, where the value in controversy shall exceed

A final comment is in order because of suggestions that have been made in the past. It is entirely appropriate that the Shipping Act, 1916, should spell out its own penalties and provide remedies even if the antitrust statutes apply to the non-approved agreements which fall within the antitrust statutes. The reason is very simple. The coverage of Shipping Act, 1916 and the antitrust statutes is not co-extensive. Conduct may offend the Shipping Act, 1916, which does not offend any of the antitrust statutes.[39]

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twenty dollars, the right of trial by jury shall be preserved, * * *." (U.S. Const., Amend. VII)

As to Federally created rights the Seventh Amendment necessarily applies to rights created by statute since there is no Federal common law. (*Erie R. Co. v. Tompkins,* 304 US 64) Whether an action to vindicate a Federally created right is one at common law within the Seventh Amendment depends on the nature of the claim. It is "at common law" even though bottomed on a Federal statute if the action is simply one for money damages (*Fleitmann v. Welspach Street Lighting Co.,* 240 US 27; *Mercoid Corp. v. Mid-Continent Inv. Co.,* 320 US 661, 671; *Beacon Theatres v. Westover,* 359 US 500).

Compare other types of actions brought for money awards which are of such character that the plaintiff is entitled to have his right to damages determined by a jury: *Dairy Queen v. Wood,* 369 US 469 (trade-mark infringement), citing *Bruckman v. Hollzer,* 152 F2d 730 (Cir. 9), (copyright infringement); *Hansen v. Safeway Stores,* 238 F2d 336 (Cir. 9) (patent infringement); *Schulz v. Penn. R. Co.,* 350 US 523, (an action under the Jones Act); and the following cases under the antitrust statutes: *Beacon Threatres, Inc. v. Westover,* 359 US 500, relying on *Fleitmann v. Welspach Street Lighting Co.,* 240 US 27; *Marks Food Corp. v. Barbara Ann Baking Co.,* 274 Fed 934 (Cir. 9); *Siegfried v. Kansas City Stock Co.,* 298 F2d 1, 5 (Cir. 8), c.d. 369 US 819.

39. Shipping Act § 15 is *both* broader and narrower than the Sherman Act. It is broader in that the Sherman Act deals only with conduct *"in restraint of trade or commerce* among the several States, or with foreign nations" while § 15 of the Shipping Act applies to *every* agreement enumerated whether "in restraint of trade or commerce" or not, i.e., unapproved agreements violate § 15 although not in restraint of trade or a violation of the Sherman Act. Upon the other hand § 15 is narrower than the Sherman Act in that it deals only with *agreements* and then *only* with agreements *between carriers and other persons subject to the Act* (see § 1, App. p. 2). It does not cover, for example, an agreement between a carrier and a shipper, although this might be in restraint of trade. The antitrust statutes are not limited by the character of the persons entering into a forbidden agreement. They also reach conduct which is without agreement and conduct of a single person.

Congress was satisfied to let regulation of carriage by water in foreign commerce rest in this posture until further inquiry, resulting in the amendments of 1961, was triggered by this Court's decision in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481. This was the third decision in this Court dealing with the long series of controversies arising out of the dual-rate system employed by some conferences of carriers by water in foreign commerce. Two attacks on this system had come here from litigation commenced in district courts. In *United States Navigation Co. v. Cunard S. S. Co.*, 284 US 474, an action by a private litigant, and in *Far East Conference v. United States*, 342 US 470, and action by the United States, this Court had held that the action *seeking injunctive relief* could not be entertained in advance of action by the Commission. Then, in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481, decided in 1958, this Court held that a dual-rate system, approved by the Commission, was illegal as matter of law as in violation of the Shipping Act and affirmed a decision of the Court of Appeals for the District of Columbia Circuit setting aside the Commission's order. This decision, at least in the opinion of many, to borrow language from Senate Report No. 860 on the proposed 1961 amendments (see note 16 above), "cast substantial doubt on the legality of the thousands of dual-rate contracts then being used by more than half the 113 inbound and outbound conferences serving U. S. ports. * * * Therefore, the situation was ripe for moratorium legislation." Congress

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The Shipping Act is comprehensive as to *agreements* between a limited class of persons. The Sherman Act is comprehensive as to parties with respect to a limited type of agreement.

Contracts which, if unfiled and unapproved, violate § 15 of the Shipping Act but which are not *in restraint of trade* are not reached by Sherman and Clayton Act penalties and remedies. If there are to be sanctions it is necessary that they be provided in the Shipping Act. Moreover, there is conduct proscribed by *other* sections of the Shipping Act, where indulged in by one carrier alone, which does not violate the Sherman Act. In respect of these matters it was necessary for the Shipping Act to provide its own sanctions.

There *was* reason for sanctions and remedies in Shipping Act, 1916 other than to displace antitrust remedies.

adopted such moratorium legislation to preserve the status quo until permanent legislation could be adopted and eventually adopted the 1961 amendments to Shipping Act, 1916.[40]

The changes to permit approval of dual-rate systems were primarily in § 14, the addition of § 14 b and some accommodating provisions to adjust to these changes. The changes to permit some form of dual-rate system are not of particular concern here. But one of the accommodating changes is of particular interest.

The Shipping Act, 1916, § 15, had provided that agreements approved under that section were exempt from the antitrust statutes. (See p. 37 above.) It has been argued, however, that under the decisions in *Cunard* and *Far East Conference,* p. 40 above, the provision was unnecessary for the reason that operation of other provisions of Shipping Act, 1916, withdrew all agreements which were subject to Shipping Act, 1916, from the operation of the antitrust statutes, whether the agreement was approved under § 15 or not. It is quite obvious this was *not* the view of Congress because when, *after* the decisions in *Cunard* and *Far East Conference,* Congress amended the Shipping Act, 1916, to permit approval of dual-rate contracts, particularly by § 14(b), *it was very careful to amend the paragraph of § 15 dealing with the exemption of approved agreements from the antitrust statutes to expressly cover those agreements permitted under § 14(b).*[41] This amendment, showing the change by italics, and taking the wording from United States Code, amended this paragraph of § 15 to read as follows:

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40. For a general background of the proposed 1961 legislation including a brief resume of the Isbrandtsen litigation and the moritorium legislation see Senate Report No. 860 note 16 above.

41. The Senate Report No. 860, note 16 above, 2 United States Congressional and Administrative News, 87th Congress First Session 1961, p. 3125, states: "All provisions of § 15, Shipping Act, 1916, excepting from the antitrust laws all agreements, modifications or cancellations lawful under this section shall be extended to exempt those lawful under § 2 of this bill."

> "Every agreement, modification or cancellation, lawful under this section, *or permitted under section 813(a)* [§ 14b] of this title, shall be executed from the provisions of §§ 1-11 and 15 of Title 15 and amendments and acts supplementary thereto.[42]"

That Congress thought that this change was necessary is completely at variance with the claim that even where there is no approval under § 15 the antitrust statutes can not operate. (Compare note 62 p. 62 below.)

The other principal amendments in 1961 were as follows: § 15 was amended to place limitations upon approval of agreements between conferences or members of different conferences and to adjust that section to new requirements for publication and filing of rates. § 16 was amended to permit certain proceedings to be instituted by the governor of any state or possession of the United States. Section 18 was amended by adding a new subdivision applying to foreign commerce (b) requiring the filing of tariffs (except for cargo in bulk), regulating changes in tariffs, providing that no carrier "shall charge or demand or collect or receive a greater or less or different compensation * * * than * * * specified in its tariffs" etc., permitting the Commission to prescribe the form of tariffs, permitting the Commission to disapprove any rate or charge which "it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States" and providing a penalty.

It will be noticed that even with the 1961 amendments no power is conferred upon the Commission to fix rates. The omission was deliberate.[43] The importance of this (when the question

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42. The antitrust statutes.

43. Senate Report No. 860, note 16 above, U.S. Code etc. News, *op. cit.*, p. 3132, states the reasons why it was considered "a serious mistake at this time in world affairs for the United States Government unilaterally to assert by statute such a bold claim of right to sit in judgment of the 'reasonableness' of international ocean freight rates. That which is foreign commerce in New York is Italy's in Genoa." The determination to leave rate regulation out of the statute and therefore beyond the competence of the Commission was deliberate and founded on strong reason.

is whether the scheme of an industry regulatory statute is so all-pervasive as to preclude court action, at least in advance of action by the administrative agency set up by the statute) as pointing to the conclusion that court action under the antitrust statutes is *not* precluded is pointed up in *United States v. R.C.A.*, 358 US 334, quoted in part at p. 71 below.

C. Congressional Regulation of Interstate Carriage by Water

In marked contrast with the scheme of Congress for regulation of foreign water carriage—principally by approved industry self-regulation,—are its schemes for regulation of interstate water carriage.[44] (And cf. language quoted from *Isbrandtsen*, 211 F2d 51 at pp. 95, 96 below.)

The provisions of the Shipping Act, 1916, noticed above and applying to carriage in foreign commerce also applied to interstate commerce (except § 17[45]) because they applied to all carriage covered by the Act. With them must be contrasted the provisions of § 18 applying *only* to "*interstate commerce.*"

The carriers in *interstate* commerce

(a) must establish and enforce "just and reasonable rates, fares, charges, classifications, and tariffs" and just and reasonable regulations and practices relating to tickets, bills of lading, etc., methods of marking and packing and all other matters connected with handling of property;

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44. *T.I.M.E. v. United States*, 359 US 464, 473 counsels that "striking differences which Congress saw fit to make between" its regulation of different types of carriers are matters of "significance". And the fact that this case held that an action could not be maintained because the regulatory statute involved provided for none and, in the particular circumstances, none could be found outside the statute does not mean that this same statute precludes resort to the courts in different circumstances when a cause of action *can* be found outside the industry regulatory statute. (*Hewitt-Robins, Ins. v. Eastern Freight-Ways, Inc.*, 371 US 84)

45. This applies only to foreign commerce.

(b) must file with the Commission and keep open for inspection the maximum rates, fares, etc. including those for through routes; and

(c) must not collect rates, etc., higher than the filed rates except with Commission approval and after notice, unless the Commission waives the notice.[46]

Whenever the Commission finds that any *such* rate, etc. "is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate" etc.[47]

Under § 19 if an *interstate* carrier reduces its rates below a fair and remunerative basis to injure a competitor it cannot increase the rates unless the Commission finds that the increase rests upon changed conditions other than the elimination of competition.

Even with these added provisions as to *interstate* water carriage Congress was not satisfied with its scheme of regulation for interstate commerce. In 1933 it expanded the scheme of statutory regulation of water carriers in the intercoastal trade by the Intercoastal Shipping Act, 1933 (App. pp. 16-20) and, in 1938, made this Act applicable "to every common carrier by water in interstate commerce as defined" in Shipping Act, 1916 § 1 (Intercoastal Shipping Act, 1933 § 5). No large attention need be paid to this legislation, except to notice that it expanded the statutory scheme of regulation,[48] because of the entirely revised Congressional scheme of regulation of 1940.

46. These provisions are pointed to in *Empire State Highway Tr. Ass'n v. F. M. B.*, 291 F2d 336 (Cir. Dist. Col.), c.d. 368 US 931 as making a difference between foreign and interstate commerce.

47. No such power over rates in *foreign* commerce was ever granted. (See p. 34ff above.)

48. "Every common carrier by water" subject to the Act "shall file with the Federal Maritime Board and keep open to public inspection schedules showing all the rates, fares" etc. "The schedules * * * shall plainly show" places, classifications, charges, privileges etc. "and any rules and regulations" etc. and shall be posted, under glass, on each vessel and at other specified places. It "shall be unlawful for any carrier" in any

By Title II of the Transportation Act of 1940, with *express repeal* of Shipping Act, 1916, as amended, and Intercoastal Shipping Act, 1933, as amended, "insofar as they are inconsistent with any provisions" of the Act of 1940 (Part III, Interstate Commerce Act, § 320, App. p. 50)[49] Congress adopted a new scheme of regulation of carriage by water in *interstate* commerce, by adding to the Interstate Commerce Act Part III. The provisions of Part III "were modeled on the provisions of Part I dealing with" regulation of carriage by railroad (*Cornell S.S. Co. v. United States,* 321 US 634, 637, quoting the House Report). The Act of 1940, by adding Part III to the Interstate Commerce Act, "subjected water carriers to the jurisdiction of the Interstate Commerce Commission."[50] These "water carrier provisions are part of

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way to prevent or attempt to prevent extending service to publicly owned terminals. (§ 2)

Whenever a new tariff provision is filed the Board may "enter upon a hearing concerning the lawfulness" of it and there may be certain suspensions "pending such hearing" and the Board "may make such order * * * as would be proper". (§ 3, App. p. 18.) If any tariff provision is found to be "unjust or unreasonable" the Board may prescribe the proper provision. (§ 4)

49. The provisions of the Transportation Act of 1940, Title II, as to carriage by water, are sweeping and, by consequence, the repeals provided for in § 320 (App. p. 50) are sweeping. But that Act does not apply to foreign commerce, as foreign commerce is defined in Shipping Act, 1916, § 1, (§ 302(i), App. p. 21, 22) (*Canton R. Co.,* p. 46 below) and the repealing provision of the Act of 1940 is very careful to provide (Subd. (c)) that nothing in its repealing provision shall affect the provisions of § 15 of the Shipping Act, 1916 "so as to prevent any water carrier subject to the provisions of" the Act of 1940 "from entering into any agreement under the provisions of said § 15 with respect to transportation not subject to the provisions of this chapter". Again, Congress is showing acute awareness that the antitrust statutes will apply unless their operation is suspended by some express legislative expression of intention or authorized approval.

50. The Commission, among other things, is authorized to make "such general or special rules and regulations and to issue such orders as may be necessary to carry out" the Act, to inquire into and to report on the management of the business of water carriers and affiliates in related activities and to that end obtain necessary information, to establish classifications of carriers, grant relief from the provisions of the Act when certain competition causes undue disadvantage and investigate, on complaint or on its own

the general pattern of the Interstate Commerce Act which grants the Commission power to regulate railroads and motor carriers as well as water carriers." (*United States v. Seatrain Lines, Inc.*, 329 US 424, 426, 429) This new Part III is designed "to provide for regulation of the rates and services of competing interstate water carriers as part of a broad plan of regulation for all types of competing interstate transportation facilities." (*Cornell S.S. Co. v. United States*, 321 US 634, 637; *United States v. Penn. R. Co.* 323 US 612, 616, 618) It is a detailed and all pervasive regulation paralleling that of Part I for railroads and serves to make clear the entirely different ideas which Congress had in respect of regulation of carriage by water in *foreign* commerce and in *interstate* commerce. This new Part of the Interstate Commerce Act "does not apply to carriers engaged in foreign commerce insofar as their carriage beyond the limits of the United States is concerned, 49 USC § 902(i)(3) [App. pp. 21, 22]" (*Canton R. Co. v. Rogan*, 340 US 511, 514, note 2), i.e. it does not apply to carriers in foreign commerce as defined in Shipping Act, 1916.

Part III of the Interstate Commerce Act is far too detailed and far too long to warrant extended review here. Its principal provisions are set out at length in the Appendix, p. 20 and following. The most cursory examination of it will show that it is, like Part I, a classical example of detailed and all pervasive regulation of an industry, policed by an administrative agency set up to administer the statute and to which is granted the power to fix rates (§ 307), in sharp contrast with the few general duties imposed on foreign commerce by Shipping Act, 1916, and that statute's principal provision in § 15 for industry self-regulation by approved arrangements between carriers, with no power in the administrative agency to fix rates. Some examples of requirements

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initiative, alleged failures to comply with the Act or requirements established under it and to make appropriate order for compliance. (§ 304, App. p. 23. Cf. § 307.)

of Part III, not to be found in Shipping Act, 1916, and very shortly indicated only by way of example, are: The duty imposed to provide transportation "upon reasonable request", "to establish reasonable through routes" and provide facilities "for the interchange of traffic" (§ 305). Transportation subject to the Act shall not be undertaken without duly filed and published tariffs (§ 306) and to engage in carriage by water "a certificate of public convenience and necessity" for common carriers, or a "permit" for contract carriers, issued by the Commission, is required (§ 309). The Commission can require filing of reports and contracts, "prescribe a uniform system of accounts", regulate "depreciation charges" and inspect and copy records (§ 313). There are, of course, detailed provisions covering rates and services and the Commission can establish classifications, rules and regulations (§ 304), prescribe "the lawful rate, fare or charge or the maximum or minimum, or maximum and minimum" etc. (§ 307 (b) and (h)), establish through routes and joint rates etc. (§ 307(c)) and the division thereof (§ 307(e)), suspend tariffs pending investigation (§ 307(g)) and regulate allowances to owners of property for services (§ 314).

It hardly seems necessary to add that Part III, like the statute on which it is modelled, has full provisions requiring that rates must be reasonable and non-discriminatory, providing that whether they are or not is within the competency of the statute's administrative agency to determine, and requiring that the common carriers to whom the Act applies collect only the rates and charges shown by duly filed and published tariffs. When there is a complaint that improper charges have been made by carriers these and their related provisions call for the application of *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 US 426, *Keogh v. Chicago & N.W. Ry.*, 260 US 156 and like cases, just as did the provisions of Interstate Commerce Act, Part I, from which the provisions of Part III are copied. But where such provisions are omitted, as they are omitted from Shipping Act, 1916, and

where the omission by Congress (with the Interstate Commerce Act before it, and with sound reason as appears from the Senate Report on the proposed 1961 amendments to Shipping Act, 1916, [see note 43 above]) could be nothing but deliberate, and where, in the statute which was adopted (Shipping Act, 1916), the Congress provided its own test as to whether the antitrust statutes would apply or not (by providing they would not apply to Commission approved agreements,—Shipping Act, 1916 § 15 p. 37 above) there is no room, we submit with deference, for application of *Abilene* or *Keogh* or to deny application of the antitrust statutes and the availability of their remedies.

D. Carriers by Water in Foreign Commerce Can Obtain Exemption from Liability for Clayton Act § 4 Treble Damages Only in the Way Congress Provided in Shipping Act, 1916, § 15

To paraphrase language from *Silver v. New York Stock Exchange*, 373 US 341, 349, the problem here arises from the need to reconcile pursuit of the antitrust aim of eliminating restraints on competition (here by application of the provision of Clayton Act § 4 and recovery of treble damages) with the effective operation of a public policy contemplating that water carriers in foreign commerce will engage in self-regulation which may well have anti-competitive effects in general and in specific applications. (And compare *McLean*, p. 2 above.)

The problem here is not really broader than in *Silver*. The only antitrust violation charged is price fixing, a *per se* violation, and the only relief sought is treble damages. There is no claim that defendants' conduct violated any of the Shipping Act, 1916's provisions proscribing conduct not resting in agreement or provisions whose application requires determination of "fairness" or "reasonableness" or "discrimination" or requires "more than ordinary familiarity with ocean transportation". The only charge is illegally increasing the lawfully established rate by $2.50 per ton

under a price fixing agreement and the only provision of Shipping Act, 1916 drawn in question is § 15 for industry self-regulation by approved agreements.

In such circumstances there are a variety of ways in which the earlier statute of wide application, based on a policy of eliminating restraints on competition and implementing that policy by outlawing price fixing agreements (p. 6 above), could be accommodated to the later statute for a single industry and based on a policy and scheme of industry self-regulation which contemplated some price fixing. By and large the accommodation could be by (1) a general or *pro tanto* replacing of the earlier broad statute by the later statute in the area covered by the later statute, whether expression of the result is by the legislature or by the courts because of the necessary effect of the later statute or (2) by providing for making an accommodation by some agency on a case by case basis as each situation arose. For industry self-regulation of common carriage by water in *foreign* commerce the latter course was adopted by Congress. Under its plan the antitrust statutes operate except when the conduct to which otherwise they would apply is excepted, on a case by case basis, because it is part of a Commission approved arrangement for industry self-regulation.

It is certain that operation of the antitrust statutes is not here precluded because Congress said so. There is no provision for express repeal in Shipping Act, 1916, either in general or *pro tanto* as there is of Shipping Act, 1916 in Part III, Interstate Commerce Act, § 320 (App. p. 50). Nor, what is much the same, is there in the Shipping Act, 1916, by force of its own express provisions, and without other action or intervention, an exception of any conduct of water carriers in foreign commerce from operation of the antitrust statutes, although litigation threatening application of the antitrust statutes was one of the things that moved Congress to study the shipping industry and the needs for its regulation (see *Isbrandtsen Co.*, p. 34 above).

But though Congress has not in terms said the antitrust statutes are displaced, still what it did in the later industry statute, it has been argued, is so at variance with application of the antitrust statutes that the courts must recognize that, to the extent of the conflict, this is the result and the antitrust statutes are displaced. The court below did not apply this rule but defendant-respondents have argued it and their answers to the petition for certiorari indicate they will argue it again, by euphemistically saying the Shipping Act, 1916 has "superseded" the antitrust statutes; that the case is one for application of a doctrine of "supersession." We prefer the time-honored name for what they have in mind and deny that there has been any repeal by implication of the antitrust statutes. As in *Mercantile Nat. Bank v. Langdeau,* 371 US 555, 565 defendant-respondents' contention of supersession "is necessarily one of implied repeal requiring some manifest inconsistency or positive repugnance between the two statutes."

The rule cannot be questioned that "repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, *and are not absolutely irreconcilable, effect should be given, if possible, to both of them." (United States v. Greathouse,* 166 US 601, 605) A statute will not be construed as taking away a right "unless that result is *imperatively* required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right *would in effect deprive the subsequent statute of its efficacy;* in other words, *render its provisions nugatory." (Texas & P.R. Co. v. Abilene Cotton Oil Co.,* 204 US 426, 437.)

It is unnecessary to review the question at large because the rule repeatedly has been stated and applied where it has been held that a general industry regulating statute did not repeal by implication, or supersede, or take the place of, or make inoperative, the antitrust statutes. These decisions, holding that there was no such repeal, not only announce the stringent limitations on finding a repeal by implication, but necessarily stand for the

proposition, articulated in *Georgia v. Penn. R. Co.*, 324 US 439, 456, that "Regulated industries are not *per se* exempt from the Sherman Act."[51]

Upon this precise subject the leading and much cited case is *United States v. Borden Co.*, 308 US 188, 197 ff,[52] concerned with application of the antitrust laws in the field of agriculture where there had been a very considerable amount of industry regulatory legislation. This Court said, addressing itself directly to the question of repeal of the antitrust statutes by implication (p. 198):

> "It is a cardinal principle of construction that repeals by implication are not favored. *When there are two acts upon the same subject, the rule is to give effect to both if possible.* (Citing cases) The intention of the legislature to repeal 'must be clear and manifest.' (Citing case) It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, 16 Pet 342, 362, 363, 10 L ed 987, 995, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' *There must be 'a positive repugnancy* between the provisions of the new law, and those of the old; and even then the old law is repealed by implication *only pro tanto to the extent of the repugnancy.'* (Citing case)"

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51. *S. S. W., Inc. v. Air Transport Ass'n*, 191 F2d 658, 661 (Dist. Col. Cir.): "But, in view of the importance of the antitrust laws to the unregulated part of the economy, the rule has been developed that the mere existence of a regulatory statute does not result in complete withdrawal of the regulated industry from the operation of the antitrust laws. Such repeals by implication are not favored. The antitrust laws have been held to be superseded by specific regulatory statutes *only* to the extent of the repugnancy between them." (*Italics in original.*)

52. *United States Alkali Exp. Ass'n v. United States*, 325 US 196, 209 reviews at some length the holding in *United States v. Borden Co.*, 308 US 188, that the Capper-Volstead Act did not operate to curtail the authority of the United States to maintain antitrust suits or give "exclusive jurisdiction" to the Secretary of Agriculture to determine whether there were violations of the Sherman Act and his action was neither a substitute for, nor a prerequisite to, a suit by the United States. *Borden Co.* is also dealt with below at p. 64 and in note 64.

Georgia v. Penn. R. Co., 324 US 439, 456, important also because it recognized the very different situation presented in *Keogh*, 260 US 156 and the limitations of that case, involved rate-fixing by rail carriers subject to the very thoroughgoing regulation of the Interstate Commerce Act. It was held that where there was no square repugnancy the antitrust laws still applied. The court said:

> "These carriers are subject to the anti-trust laws. United States v. Southern P. Co. 259 US 214, 66 L ed 907, 42 S Ct 496. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. United States v. Trans-Missouri Freight Asso. 166 US 290, 41 L ed 1007, 17 S Ct 540; United States v. Joint Traffic Asso. 171 US 505, 43 L ed 259, 19 S Ct 25. * * * It is true that the Commission's regulation of carriers has greatly expanded since the Sherman Act. See Arizona Grocery Co. v. Atchison, T. & S.F. R. Co., 284 US 370, 385, 386, 76 L ed 348, 353, 354, 52 S Ct 183. But it is elementary that repeals by implication are not favored. Only a *clear repugnancy* between the old law and the new results in the former giving way *and then only pro tanto to the extent of the repugnancy*. United States v. Borden, supra, (308 US 198, 199, 84 L ed 190, 191, 60 S Ct 182)."

Silver v. N. Y. Stock Exchange, 373 US 341, had for decision whether the antitrust statutes were superseded by the Securities Exchange Act and its scheme of industry self-regulation.[52a] After stating the problem in language which we have paraphrased,

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52a. The scheme of self-regulation was that of adoption of rules and regulations by exchanges. These were not wholly at the whim of the exchanges because the Act placed upon the exchanges a duty to register with the Commission, registration could not be granted unless the exchange submitted copies of its rules and unless the rules were just and adequate to insure fair dealing and to protect investors, the Commission was given power to order changes in exchange rules with respect to a number of subjects and registration was subject to some control of the Commission. (15 USC § 78s)

above at p. 48, the court said that "the proper approach to this case, in our view, is an analysis *which reconciles the operation of both statutory schemes with one another* rather than holding one completely ousted."

> "The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '[i]t is a cardinal principle of construction that repeals by implication are not favored.' United States v. Borden Co. 308 US 188, 198, 84 Led 181, 199, 60 S Ct 182; see Georgia v. Pennsylvania R. Co. 324 US 439, 456, 457, 89 Led 1051, 1062, 65 S Ct. 716; California v Federal Power Com. 369 US 482, 485, 8 Led 2d 54, 57, 82 S Ct 901. Repeal is to be regarded as implied *only if necessary* to make the Securities Exchange Act work, *and even then only to the minimum extent necessary.* This is the guiding principle to reconciliation of the two statutory schemes."

The very recent *United States v. Philadelphia Nat. Bank*, 374 US 321, 350, held that the antitrust statutes were not superseded by the Bank Merger Act and proceedings under it:

> "No express immunity is conferred by the [Bank Merger] Act. *Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored*[53] and have only been found in cases of *plain repugnancy* between the antitrust and regulatory provisions.[54] Two recent cases, *Pan American World Airways, Inc. v. United States*, 371 US 296, 9 Led

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53. At this point, in its footnote 28, the Court collects 18 of its own decisions beginning with the *Trans-Missouri Freight Association Case*, 166 US 290, 314 and coming down through *Silver v. New York Stock Exchange*, 373 US 341.

54. The Court at this point cites, in its note 29, *Keogh*, 260 US at 163, the *Panagra Case, Pan American etc. v. United States*, 371 US at 309, 310 and "Cf." the *Abilene Oil Case*, 204 US 426.

2d 325, 83 S Ct 476, and *California v. Federal Power Com.*, 369 US 482, 8 Led 2d 54, 82 S Ct 901, illustrate this principle."

There is no such plain repugnancy between the antitrust statutes and the substantive provisions of Shipping Act, 1916 (the provision in § 15 for exemption of approved agreements aside,—we deal with this below) as would work a repeal of the former by the latter. Not even *Cunard*, 284 US 474 (dealt with at p. 80ff below) or *Far East Conference*, 342 US 570 (dealt with at p. 83ff below) has suggested this and, indeed, there is a clear implication in the latter that there was no such repeal (see pp. 84, 85 below). There is no repugnancy between prohibition of restraint of trade, attempt to monopolize, and monopoly of the Sherman Act and prohibition of the use of fighting ships, unjust and unreasonable practices, discriminations and preferences, false billing and the like of the Shipping Act.

Two somewhat special considerations remain to be noticed. The first is that the industry regulatory statute provides some remedy. The second has to do with a limited form of agency approval.

There has been an attempt to argue that Shipping Act, 1916, has provided a remedy which Petitioner might (but did not) invoke and therefore this remedy is exclusive. But a statutory remedy, even one for relief through administrative channels, is not of necessity repugnant to other remedies at common law or by statute. The Interstate Commerce Act, by providing for proceedings for relief before the Commission, saving common-law remedies and expressly providing for an election to proceed in Court or before the Interstate Commerce Commission, demonstates this. It may be that a claimant by selecting one remedy forecloses later resort to the other (see note 57 below) and a claimant will not be permitted to have two satisfactions. Still

this does not mean that there cannot be dual and parallel remedies and enforcement and that a claimant cannot have his choice as to the course he will follow (*United States v. Philadelphia National Bank*, 374 US 321, 347; *United States v. W. T. Grant Co.*, 345 US 629. Cf. *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285) particularly where the statutory remedy is not an equivalent (*Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 US 84[55]; *Panagra-Pan American World Airways, Inc. v. United States*, 371 US 296 and its comments on *Hewitt-Robins*[56]; *Far East Conference*, pp. 84, 85 below; *Georgia v. Penn. R. Co.*, 324 US 439; *United States v. Borden Co.*, 308 US 188, 205, 206 here comparing the Capper-Volstead Act with the antitrust laws,—we deal with it elsewhere; *International Assn. etc. v. Gonzales*, quoted in note 30 p. 32 above; *Trans World Airlines, Inc. v. Hughes*, quoted in note 30, p. 32 above). No one will assert that anything the Commission could award under Shipping Act, 1916 § 22, or that could be recovered by action under § 30 if the award is not satisfied, is remotely the equivalent of the remedy under Clayton Act § 4 (see p. 29 above).

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55. Whether the pre-existing remedy survives "depends on the effect of the exercise of the remedy upon the statutory scheme of regulation." The remedy survives where "rather than running interference against the Act the exercise of the judicial remedy supports its overall purposes and is in nowise inconsistent with the Congressional scheme embodied within its four corners." It was held that a shipper could maintain an action for damages suffered as a result of a carrier's improper routing practices even though the Commission, apparently, had some control of the practices, i.e. could issue a cease-and-desist order.

56. "If it were clear that *there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C.A.B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways Inc.*, 371 US 84, where litigation is held by a court until the basic facts and findings are determined by the administrative agency, *so that the judicial remedy not available in the other proceeding, can be granted.*"

See further the language quoted pp. 91, 92 below.

The matter of exclusive remedy does not end here. The argument that Shipping Act, 1916 §§ 22 and 30 provide the only remedy by way of money compensation for damage resulting from conduct that violates the antitrust statutes and Shipping Act, 1916 § 15 presents a problem more fundamental than that of statutory construction. To so construe Shipping Act, 1916 and to attribute to it that effect would render these remedial provisions unconstitutional under the guaranty of right to jury trial of the Seventh Amendment.

Relief in specie under Shipping Act, 1916 §§ 22 and 29, by cease-and-desist or similar order, presents no such problem. Such relief has its opposite number in relief in equity where there is no trial by jury as matter of right. There cannot be the constitutional objection to direct enforcement of such an order, as provided for in § 29 (see p. 38 above). But where the claim is for *money,* and so is of the sort to which the guarantee of the Seventh Amendment applies (see note 38 p. 38 above), if the only procedure provided is to obtain an agency award and, if not complied with, enforcement of the award *with no opportunity to retry the merits,* the respondent upon whom the result is forced properly can complain that he had been deprived of his right of jury trial. To avoid this result the rights of *respondents* to jury trial are preserved by the Shipping Act. The respondent can refuse to pay. Under § 30, if the money award under § 22 is not complied with the claimant (as his *only* recourse) can then sue on his original claim, there is a trial *de novo,* in the action the Commission award is not conclusive but is only *prima facie* evidence and the defendant is entitled to assert all defenses before a jury. (See notes 37 and 38 p. 38 above). All this is spelled out in cases under Interstate Commerce Act § 16(2) as amended by the Act of March 2, 1889, designedly to avoid the constitutional objection just noticed (see note 58), which is the prototype of

Shipping Act, 1916 § 30: *United States v. I.C.C.*, 337 US 426, 437[57]; *Western etc. R. Co. v. Penn. Ref. Co.*, 137 Fed 343, 349[58] (Cir. 3), aff'd 208 US 208.

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57. This case (by quotation from *Baltimore & O. R. Co. v. Brady*, 288 US 448, 458) explains: "It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that Congress saved their rights to be heard *in court upon the merits* of claims asserted against them. The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him."

The rule of election stated in this quotation is recognized and stated in *Terminal Warehouse Co. v. Penn. R. Co.*, 297 US 500, see esp. 507, and *Union P. R. Co. v. Price*, 360 US 601.

The provision of Interstate Commerce Act § 16(2), the section involved, is almost word for word the same as Shipping Act § 30 and provides: "If a carrier does not comply with an order for the payment of money * * * the complainant * * * may file in the district court * * * a complaint *setting forth briefly the causes for which he claims damages*, and the order of the Commission" and on the trial "the findings and order of the Commission shall be *prima facie evidence* of the facts therein stated". (49 USC § 16(2))

58. "Under the act as originally passed such proceedings [for enforcement] were solely in equity. As the *constitutional guarantee of the right to trial by jury* attaches to the enforcement in a federal court of an order or requirement of mere pecuniary reparation, there was no means to compel payment, and such order or requirement, if not a nullity, was at least ineffective. It was, consequently, the uniform practice of the commission, prior to the taking effect of the amendatory act of March 2, 1889, c. 382, 25 Stat. 855 [U.S. Comp. St. 1901, p. 3158] to decline to order, require or recommend pecuniary reparation. Councill v. Railroad Co., 1 Interst. Com. Com'n R. 339; Heck & Petree v. Railway Co., 1 Interst. Com. Com'n R. 495; Riddle, Dean & Co. v. Railroad Co., 1 Interst. Com. Com'n R. 594, 607; Rawson v. Railroad Co., 3 Interst. Com. Com'n R. 266; Macloon v. Railway Co., 5 Interst. Com. Com'n R. 84. Such refusal on the part of the commission was based on one or the other of two grounds; one of them being, as stated in Heck & Petree v. Railway Co., that *'the claim for pecuniary damages made by complainants * * * presents a case at common law in which the defendants are entitled to a jury trial'*; and the other as stated in Rawson v. Railroad Co., that 'as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at Common Law and where more than twenty dollars was involved, we could award no reparation *in consequence of the provisions of the seventh amendment* to the Constitution of the United States.' But by the act of March 2, 1889, c. 382, § 5, 25

This takes care of any question the *respondent* could raise. But it does not take care of the case of a *claimant* who is awarded nothing or less than he thinks he should get. Under Shipping Act, 1916, no trial *de novo*, with trial by jury, is provided for him.[59]

Under the Interstate Commerce Act there is no problem as to claimants. Common-law remedies are preserved and if the claimant elects not to pursue them, but to proceed under the Act, he has had his choice and is bound by his election (see note 57 above). But, under the Shipping Act, 1916, if the claim is one against a common carrier by water in foreign commerce and *if* the *only* remedy available is resort to the Commission under Shipping Act, 1916 § 22, there is no further proceeding available in which the merits can be tried to a jury for a claimant *denied* relief by the Commission. So such claimant *also has been deprived of trial by jury.*[60] This is the very result which the Court of Ap-

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Stat. 859 [U.S. Comp. St. 1901, p. 3167] § 16 (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U.S. Comp. St. 1901, p. 3165]) was so amended as to provide for trial by jury and judgment as at common law on the law side of the court in proceedings for the enforcement of orders or requirements of the commission involving matters 'founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States.' In proceedings at law under section 16, as amended, for the enforcement of an order or requirement of the commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

59. Section 30 applies only "In case of violation of any order * * * for the payment of money". If no award is made there is no order that can be violated. If the order is for less than the claimant wants but the respondent offers to pay there is no violation.

60. He may have the denial of relief reviewed and in a proper case the Commission's decision would be set aside, but still he would not have a jury trial whether this was final or he was sent back to the Commission. His only review is under the Review Act of 1950, 5 USC § 1031ff and is exclusively by Courts of Appeals under 5 USC § 1032 (*D. L. Piazza Co. v. West Coast Lines, Inc.*, 210 F2d 947 (Cir. 2), c.d. 348 US 839, result recognized in *United States v. Philadelphia Nat. Bk.*, 374 US 321, 354).

peal envisaged for Petitioner Carnation Company and its present claim. The Court was rather full in suggesting how the Commission might find ways to deny an award to Petitioner with the necessary implication that if such an award were sought and denied Petitioner was all through! If this is the result Carnation's claim, not as a matter of its election, but by a course of proceedings forced on it, would have been determined against it without jury trial.

The second special consideration suggested above p. 54 is the provision, in an industry regulating statute, forbidding specified transactions (as mergers) without the approval of the statute's policing agency and providing for such approval in proper cases. If application has been made to the agency and permission has been denied nothing is done and there is no antitrust violation. But if the agency has been applied to and has given approval, or can still act to give approval, and the situation is such that in acting it can or should give consideration to the antitrust statutes and their policy, or may resolve industry question which could reflect on the resolution of claims of antitrust violation, how far is it open to courts to entertain antitrust litigation? The answer is that where the agency is given no power to decide antitrust issues as such, and is given no power to exempt from the antitrust statutes, the antitrust issues can and must be decided by the courts, whether the administration agency has acted or not. If the agency has not acted, under *California v. Fed. Power Com'n,* below, (and see p. 28 above) the courts must not wait on agency action but must proceed promptly with the discharge of their own proper functions.

United States Alkali Export Ass'n v. United States, 325 US 196;

United States v. R. C. A., 358 US 334;

California v. Fed. Power Com., 369 US 482;

United States v. Philadelphia Nat. Bk., 374 US 321;

United States v. First Nat. Bk. etc. of Lexington, 376 US 665.

United States Alkali Exp. Ass'n held that exclusive jurisdiction of aspects of foreign trade was not vested in the Federal Trade Commission, under the Webb-Pomerene Act. The argument was that it was implicit from the statute as a whole that the Commission should act before the Attorney General acted. In rejecting the argument the Court pointed out that "a pro tanto repeal" of the antitrust statutes "would require a clear expression of that purpose by Congress"; that the Act did not give the Commission power to make "any binding adjudications" under the antitrust statutes. Even if the case were one of concurrent jurisdiction, grant of power to the Commission "would curtail the authority of the United States to conduct antitrust suits *only if it were deemed to be an implied repeal pro tanto* of § 4 of the Sherman Act. As we pointed out in *U. S. v. Borden Co.*, supra, such repeals by implication are not favored."[61]

United States v. R. C. A., above, is most significant. There was an exchange of television stations. The necessary approval, under the Federal Communications Act, of the Federal Communications Commission *had been obtained.* Approval was not to be given unless the "public interest, convenience, and necessity" will be served and the Commission was to take into consideration federal antitrust policy. But it was still open to the United States to bring action under the antitrust laws. The regulatory scheme of the Communications Act had not so displaced the Sherman Act that attack for antitrust reasons could only be by direct review. The court very carefully reviewed the industry regulatory statute, compared it with regulation under other statutes, pointed out that its scheme *was not all-pervasive,* that it could not be concluded that the FCC had authority "to pass on antitrust violations as such" and held that, as a result, "courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action." (See esp. p. 348ff) The significant teaching is that in

61. See note 52 above.

determining whether the antitrust statutes must give way, *the scheme of the regulatory act must be looked to,* it must be recognized that the scope of all industry statutes is not the same, that some are not all-pervasive and that *where the scheme is not all-pervasive in the area of possible antitrust violation the antitrust statutes are not displaced.* We have pointed out (see p. 33 ff above) that the scheme of regulation of carriage by water in *foreign* commerce under the Shipping Act is not all-pervasive, particularly in comparison with the scheme of regulation of carriage by water in *interstate* commerce.

California v. Fed. Power Com. carries *United States v. R. C. A.* on one step. The Federal Power Commission granted the authority for a merger required under the National Gas Act, in spite of a Government attack on the proposed transaction in an antitrust suit. It was pointed out: "Here, as in United States v. Radio Corporation of America, 358 U.S. 334, while 'antitrust considerations' are relevant to the issue of 'public interest, convenience, and necessity' (id. 358 US at 351), there is no 'pervasive regulatory scheme' (ibid.) *including the antitrust laws* that has been entrusted to the Commission." It was held that it was the duty of the district court *to proceed with the antitrust litigation* without waiting upon any action by the Commission and it was the duty of the Commission to hold its hand until the antitrust litigation had run its course. A decision affirming the agency action was reversed.

United States v. Philadelphia Nat. Bk., and the *Lexington Bank Case* held that approval of a bank merger under the Bank Merger Act, did not preclude an attack under the antitrust laws. We have quoted at p. 53 above what the *Philadelphia Bank Case* had to say about repeal by implication. It held that *California v. Fed. Power Com.*, above, controlled rather than *Panagra, Pan American World Airways, Inc. v. United States,* 371 US 296, pointing out: *California v. FPC* held that approval did not confer immunity even though the agency had taken into consideration the com-

petitive factor; in spite of detailed regulation and close supervision of many phases of banking Congress did not "embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory statute, or disruptive of that function." The "close surveillance of the industry with a view toward preventing unsound practices * * * does not make federal banking regulation all-pervasive".

Extended comment is not required to point up the pertinency of these cases in view of the very limited and non-pervasive scheme of regulation of carriers by water in *foreign* commerce.

These cases emphasize what we have said before (see the quotation from *Georgia v. Penn. R. Co.*, p. 51 above), that regulated industries, even where the regulation is detailed and the industry regulatory statute sets up an agency or agencies to administer the statute and police compliance, are not *per se* exempted from the antitrust statutes.

Still more important for the case at bar are the decisions under statutes which, like Shipping Act, 1916 § 15 (p. 37 above), provided for accommodation of antitrust policy with the terms and policy of industry regulatory statutes on a case by case basis by authorizing the policing agency under the industry regulatory statute to approve conduct of a described sort and providing that upon such approval the approved conduct is exempted from the antitrust laws.[62] Such a scheme of accommodation has not only the advantage of postponing the determination whether to make the accommodation, by lifting the ban of the antitrust statutes, until the problem presents itself concretely in terms of the specifics of

62. E.g. Interstate Commerce Act, 49 USC §§ 5(11), 5b(9); Federal Aviation Act, 49 USC § 1384; Communications Act of 1934, 47 USC §§ 221(a), 222(b)(i); Agricultural Marketing Agreement Act, 7 USC § 608b. Notice those adopted *after* Shipping Act, 1916 § 15 and *after Cunard*, 284 US 474 (1932). We are told that the provisions of Federal Aviation Act (49 USC §§ 1382 and 1384) were modeled on Shipping Act, 1916 § 15 (*McManus v. CAB*, 286 F2d 414, 419 (Cir. 2), c.d. 366 US 928).

the precise phase of the industry involved and of the very transaction for which immunity from the antitrust laws is sought, but has the further advantage of permitting the administrative agency, charged with the duty of approval or disapproval, to do more than say just "yes" or "no" but to vary "the precise adjustments which it must make * * * from instance to instance" (*McLean Trucking Co. v. United States,* 321 US 67, 80; cf *Isbrandtsen,* 211 F2d 51 quoted at p. 96 below) and to select among possible alternatives (cf. *Minneapolis & St. L. R. Co. v. United States,* 361 US 173). The scheme contemplates that the approving agency shall have some room to move in. Under such a scheme failure to apply for approval or denial of approval does not exempt from the antitrust statutes. The mere "existence of the authority" to approve "although unexercised" does not "destroy[s] the operation of § 1 of the Sherman Act" (*United States v. Borden Co.,* 308 US 188, 198). The effect of failure to apply for or obtain approval is settled.

The following are decisions under statutes of the sort just noticed:

United States v. Borden Co., 308 US 188;

United States v. Socony-Vacuum Oil Co., 310 US 150, 226;

McLean Trucking Company v. United States, 321 US 67;

Minneapolis & St. L. R. Co. v. United States, 361 US 173;

Maryland & Virginia etc. Ass'n v. United States, 362 US 458;

Isbrandtsen Co. v. United States, 211 F2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990;

Chicago & N.W. Co. v. Peoria & Pekin etc. Co., 201 F. Supp 241 (So. Dist. Ill.), aff'd 319 F2d 117 (Cir. 7), c.d. 375 US 969.

California v. Fed. Power Com'n, 369 US 482, 485, referring to the holding in *Maryland v. Virginia etc. Ass'n v. United States,* above, that a transaction in question was not one of the sort covered by the authority of the Secretary of Agriculture to approve

under the Capper-Volstead Act and therefore was properly condemned by the District Court, and citing *United States v. Borden Co.*, above at pp. 190-192, summarized what is the holding of the above cases by saying:

> "We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nevertheless granted an overall inclusive one."

In *McLean* and *Minneapolis & St. L. R. Co.*, above, consolidations had been approved. The holdings are, necessarily, that the Commission's act in approving is open to direct attack for failure to accord sufficient weight to the policy of the antitrust statutes,—the claim, though rejected was entertained,—and it is implicit in the holdings that only *proper* approval of the transaction can immunize it from direct operation of the Sherman and Clayton Acts.

The square holding of *United States v. Borden Co.*,[63] above, speaking of the authority of the Secretary of Agriculture, by affirmative action, to immunize from operation of the antitrust statutes,[64] appears from the following:

> "In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although

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63. See note 52 above.

64. The lower court had held that since under the Agricultural Marketing Agreement Act regulatory powers had been conferred upon the Secretary of Agriculture operation of the antitrust statutes was superseded. This Court reversed. It said that the lower court attributed this effect to the statute *per se* "that is, to its operation in the absence, and without regard to the scope and particular effects, of any marketing agreement * * *." It answered with the language quoted above in the body and then stated, in the language quoted above at page 51 the rule as to repeal by implication and went on to point out that under the Agricultural Act "a particular plan is set forth" to carry out the policy of that Act; that the "statutory program" to be followed "requires the participation of the Secretary of Agriculture" and that the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact *that the former is delimited by the prescribed action participated in and directed by an officer of the Government.*

unexercised, wholly destroys the operation of § 1 of the Sherman Act with respect to the marketing of agricultural commodities.[64]

"We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they may contain, the commerce in agricultural commodities is stripped of the safeguard set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. *We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create 'so great a breach in historic remedies and sanctions.'* "

To the same point the Court further said:

"It is not necessary to labor the point, *for the Argicultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable.* * * * These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. *If Congress had desired to grant any further immunity Congress doubtless would have said so.*"

United States v. Socony-Vacuum Oil Co. makes clear that exemption from the antitrust statutes can be obtained only through affirmative and effective action; that claimed acquiescence by government employees could provide no immunity from the antitrust laws for *"Congress has specified the precise manner and method of securing immunity. None other would suffice"*; that even if proper approval had been had, the immunity obtained *would not survive the expiration of the Act under which the approval was given.* (310 US at 226, 227)

Maryland & Virginia etc. Ass'n, following *Borden Co.,* held that no immunity from the antitrust statutes was provided by the scheme alone of the Capper-Volstead Act, nor by the provision that immunity might be granted by action of the Secretary of Agriculture where there had been no such action.

The part of *Chicago & Northwestern,* above, with which we are concerned, is the holding that a proceeding under Interstate Commerce Act § 5 (2) will not serve as a substitute for approval under § 5(1) providing for the approval of pooling agreements, because the ICC never made the findings required under § 5(1). There was no immunity from attack under the antitrust statutes because "the Interstate Commerce Commission has never been asked to, and never has attempted to authorize such pooling under Section 5(1) of the Act."

Isbrandtsen Co. v. United States, 211 F.2d 51, 57 (Cir. Dist. Col.), c.d. 347 US 990, above, goes no farther than these cases but applies their reasoning to a Shipping Act case. (See p. 95 below.)

It is implicit in all of these cases that whether the approval necessary to exempt from the antitrust cases was or was not given is an antitrust question and justiciable. In *Borden Co.,* the court could determine whether the Secretary of Agriculture had acted so as to exempt from the antitrust statutes. The question did not have to be sent to him for determination. In *Socony-Vacuum Oil* the Court directly passed on the sufficiency of the conduct claimed to amount to approval and held that it did not. Nor does the possibility that both statutes may have been violated mean that allowing antitrust treble damages is repugnant to the industry regulatory statutes. To the contrary they are complementary. This was the conclusion of Congress when, with the precise question drawn to its attention (*Isbrandtsen,* p. 34 above) it deliberately elected to exempt from the antitrust statutes only approved agreements.

It is commonplace that the same conduct can violate more than one statute (*Federal Trade Com'n. v. Cement Institute*, 333 US 683, 693ff; *S. S. W. Inc. v. Air Transport Ass'n*, 191 F2d 658, 664, col. 1 (Cir Dist Col),—pointing out that the antitrust laws continue to operate unless there is absolute repugnancy with a later controlling statute). In the case at bar no injunctive relief is sought; no relief which will embarrass either the operation of the Shipping Act or the Commission. Concededly if application to the Commission for reparations were made money relief could be granted and payment enforced by jury trial under § 30. The fact that under the antitrust statutes the money recovery will be threefold although more unpleasant for the defendants will no more affect the operation of the Shipping Act and performance of its functions by the Commission than would single recovery under Shipping Act §§ 22 and 30.

In the circumstance, where Congress in Shipping Act § 15 has provided the way for working exemption from the antitrust statutes and the means provided have not been used, it would seem entirely improper, under the cases just noticed, to attempt to find some other reason for exemption. The antitrust statutes are applicable and no reason appears why they are not *fully* applicable,—no reason appears why they apply only in part,—and the provisions for remedies are as applicable as are the rest.

E. Nothing in the Functions of the Federal Maritime Commission Stands in the Way of Clayton Act § 4 Treble Damage Actions

1. The Doctrine of Primary Jurisdiction

Avoiding really coming to grips with the proposition that Congress, in § 15 of the Shipping Act, has provided the definitive test for determining when conduct of common carriers by water in foreign commerce is exempted from the antitrust treble damage actions and that when not so exempted, by Commission approval, the antitrust statutes, and *all of them* including the

Clayton Act, § 4 treble damage provision, can be applied, it is said that the present action cannot be maintained (even if there is no implied repeal of the antitrust statutes) because such employment of the judicial process is not compatible with the performance by the Commission of functions committed to it by the Shipping Act. For this *United States Navigation Co. v. Cunard S. S. Co.*, 284 US 474 and *Far East Conference v. United States*, 342 US 570 are relied on. The doctrine on which they rest is a growth from *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 US 426 (see *United States v. R.C.A.*, p. 70 below). A landmark decision in the course of the doctrine's development is *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285, setting limits and holding the doctrine did not apply and that the court should proceed to decision. In *Cunard* this decision was the Court's principal reliance. *Far East Conference* did little more than follow *Cunard*.

For want of a name generally found to be better the doctrine is known as the primary jurisdiction doctrine.

The "doctrine requires judicial abstention in cases where *protection of the integrity of a regulatory scheme* dictates *preliminary* resort to the agency which administers the scheme" (*United States v. Philadelphia Nat. Bk.*, 374 US 321, 353) as a "mode of accommodating the complementary roles of courts and administrative agencies" (*Far East Conference v. United States*, 342 US 570, 575). It is a rule of administration for "promoting of proper relations between the courts and administrative agencies charged with particular regulatory duties" (*United States v. Western Pac. R. Co.*, 352 US 59, 63). In this respect the doctrine is not wholly unlike the mode of accommodating statutes themselves by use of another judicial doctrine, the doctrine of implied repeal (pp. 50-54 above). The doctrine is one for allocating the handling of the business of governing among available agencies and not one for the determination of substantive rights. As in *Far East Conference*, p. 83 below, and in *Panagra*, p. 89 below, the question is

not of the relief to which a plaintiff is entitled,—whether more or less than that contemplated by the antitrust statutes,—but *only* of where to go to get it. Indeed, in *United States v. Philadelphia Nat. Bk.*, just above, at p. 354, this Court said that "the considerations that militate against finding a repeal of the anti-trust laws by implication from the existence of a regulatory scheme also argue persuasively against attenuating, by postponing, the courts' jurisdiction to enforce those laws."

The doctrine of "primary jurisdiction" is judicial in origin (see *United States v. R.C.A.*, quoted at p. 70 below) and development. By consequence its contours are shaped by and follow the reasons which account for its creation, which have guided its development and which justify it. It is not enshrined in hallowed legislative-given words which (if clear) provide the only answers, however far they may depart in their application from the needs to which they originally responded. For proper application of the doctrine it is not enough to look alone to an authoritative text and to devine its meaning,—indeed there is none,—but it is necessary to know its underlying reasons and it is important to know what it is *not*. This is far from original with us. All this this Court has spelled out, repeatedly, in one form or another. (See for examples, *United States v. Western Pac. R. Co.*, quoted at pp. 70, 73 below and *United States v. R.C.A.*, quoted at p. 70 below.)

The doctrine is *not* one that questions responding to its test are for administrative determination alone. It is not to be confused, as is sometimes done, with the doctrine upon which such cases as *Keogh v. C. & N. Ry. Co.*, 260 US 156[65] and *Best v. Humboldt Placer Mining Co.*, 371 US 334, rest. Such cases must be put to one side. The distinction is pointedly made in *United States v. Western Pac. R. Co.*, 352 US 59, 63:

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65. Mr. Justice Brandeis was the author of the opinion in *Keogh* as well as in *Great Northern v. Merchants Elevator*, p. 68 above and the two opinions were only 5½ months apart. He was not confusing the two doctrines.

"The doctrine of primary jurisdiction, like the rule of requiring exhaustion of administrative remedies, is concerned with promoting *proper relationships between the courts and administrative agencies* charged with particular regulatory duties. *'Exhaustion'* applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. *'Primary jurisdiction'*, on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of and administrative body; in such a case the judicial process is *suspended* pending *referral* of such issues to the administrative body *for its views.*[66] General American Tank Car Corp. v. El Dorado Terminal Co., 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325."

A leading statement of the doctrine of primary jurisdiction is that of *United States v. R. C. A.,* 358 US 334, 346, where the court said:

"The doctrine originated with Mr. Justice (later Chief Justice) White in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. *It was grounded on the necessity for administrative uniformity,* and, in that particular case, for maintenance of uniform rates to all shippers. A second reason for the doctrine was suggested by Mr. Justice Bandeis in Great Northern R. Co. v. Merchants Elevator Co., 259 US 285, 291, 66 L ed 943, 946, 42 S Ct 477, where he pointed to the need for administrative skill 'commonly to be found only in a body of experts' in handling the 'intricate facts' of, in that case, the transportation industry.

66. That the determination made on such referral may be determinative of the court action,—compare *El Dorado Oil Works v. United States,* 328 US 12 with the *General American Tank Car* decision cited in the quotation, and see the language quoted from *United States v. Philadelphia Nat. Bk.,* at p. 72 below,—should not but probably has contributed to confusion of the doctrines of "exhaustion" and "primary jurisdiction."

"Thus, when questions arose as to the applicability of the doctrine to transactions allegedly violative of the antitrust laws, particularly involving *fully regulated industries* whose members were *forced to charge only reasonable rates approved by the appropriate commission,* this Court found the doctrine applicable. United States v. Pacific & A. R. & Nav. Co., 228 US 87, 57 L ed 742, 33 S Ct 443; Keogh v. Chicago & N. W. R. Co. 260 US 156, 67 L ed 183, 43 S Ct 47; United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; Georgia v. Pennsylvania R. Co. 324 US 439, 89 L ed 1051, 65 S Ct 716; Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492. At the same time this Court carefully noted that the doctrine did *not* apply when the action was only for the purpose of dissolving the conspiracy through which the allegedly invalid rates were set, for in such a case there would be no interference with rate structures, or a regulatory scheme. United States v. Pacific & A. R. & Nav. Co. 228 US 87, 57 L ed 742, 33 S Ct 443, and Georgia v. Pennsylvania R. Co. 324 US 439, 89 L ed 1051, 65 S Ct 716, both supra. The decisions sometimes emphasized the need for administrative uniformity and uniform rates, Keogh v. Chicago & N. W. R. Co. 260 US 156, 67 L ed 183, 43 S Ct 47, supra, while at other times they emphasized the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action. United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247, supra, and Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492, supra, *as explained in* Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 497-499, 2 L ed 2d 926, 937, 938, 78 S Ct 851."

Two other important statements by this Court, both since *Panagra, Pan American World Airways, Inc. v. United States,* 371 US 296, noticed below at p. 89, are in the *Philadelphia Bank Case* and very recently in the *Meat Cutters Case. United States v. Philadelphia Nat. Bk.,* above, at p. 353, said:

"We note finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where *protection of the integrity of a regulatory scheme* dictates *preliminary* resort to the agency which administers the scheme. See Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492; Great Northern R. Co. v. Merchants Elevator Co. 259 US 285, 66 L ed 943, 42 S Ct 477; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv L Rev 436, 464 (1954). *Court jurisdiction is not thereby ousted,* but only postponed. See General American Tank Car Corp. v. El Dorado Terminal Co. 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325; Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 498, 499, 2 L ed 2d 926, 937, 938, 78 S Ct 851; 3 Davis, Administrative Law (1958), 1-55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies, the present action would not be barred for the agency proceeding was completed before the antitrust action was commenced. Cf. United States v Western P. R. Co. 352 US 59, 69, 1 L ed 2d 126, 135, 77 S Ct 161; Retail Clerks International Asso. v. Schermerhorn, 373 US 746, 756, 10 L ed 2d 678, 685, 83 S Ct 1461. We recognize that the practical effect of applying the doctrine of primary jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision, see Federal Maritime Board v Isbrandtsen Co. 356 US 481, 2 L ed 2d 926, 78 S Ct 851, supra; cf. D. L. Piazza Co. v. West Coast Line, Inc. 210 F2d 947 (CA2d Cir 1954), or even to preclude such enforcement entirely *if* the agency has the power to approve the challenged activities, see United States Nav. Co. v. Cunard S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; cf. United States v. Railway Express Agency, Inc. 101 F Supp 1008 (DC D Del 1951); but see Federal Maritime Board v. Isbrandtsen Co. 356 US 481, 2 L ed 2d 926, 78 S Ct 851 supra."

And by the same token when Congress has determined that only approved agreements are exempted from the antitrust statutes it has determined what is necessary for protection of the integrity of the regulatory scheme, at least where the question is *not* of conduct in the future which the administrative agency can still act to exempt.

In the *Meat Cutters Case, Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America v. Jewel Tea Co., Inc.*, 381 US 676, 14 L ed 2d 640, 646, 85 S Ct 1596 this Court quoted part of the language quoted at p. 70 above from *United States v. Western Pac. R. Co.* and for the rest of its desired statement quoted other of its own language:

> "The doctrine is based on the principle 'that in cases raising issues of fact not within the conventional experiences of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over,' *Far East Conference v. United States*, 342 U. S. 570, 574, and 'requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme,' *United States v. Philadelphia Nat. Bank*, 374 U. S. 321, 353."

The doctrine is not one to reduce the rights of a party either directly or by remitting him to a remedy which will not give him everything that is his due, or to excuse courts from the discharge of their proper functions.[67] To the contrary it is designed only to make the business of governing reasonably efficient in providing the fullest appropriate relief. To again call on *United States v. Western Pac. R. Co.*, above, at p. 64:

> "In every case the question is whether the reasons for the existence of the doctrine are present and whether the

67. Cf. *California v. Fed. Power Com'n*, p. 77 below and *The American Ship Building Co. v. N.L.R.B.*, p. 78 below.

> purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the *desirable uniformity* which would obtain if initially a specialized agency passed on *certain* types of administrative questions. See Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 US 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed."[68]

It should result, *and it has resulted*, that where the reasons for application of the doctrine are not present the court *must* proceed in ordinary course with its regular business. (*California v. Fed. Power Com'n*, p. 77 below.) The leading case on the limitations of the doctrine and its non-application where the question is one of law, traditionally for the courts and on which uniformity can be achieved through the courts, is the frequently cited and quoted case, *Great Northern R. Co. v. Merchants Elevator Co.*, p. 68 above. That, like this, was an over-charge case. The question was one of construction of a tariff, not calling for any expert appraisal of complicated accounting data (as in *U. S. v. Western Pac. R. Co.*, above), and *was one of law*.[69] No resort to the Commission was required in order to obtain uniformity. (See acc. *W. P. Brown etc. Co. v. L. & N. R. Co.*, 299 US 393) Holding that the court could proceed without prior resort to the Commission this Court said:

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68. In *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285, 291, in language which frequently has been quoted, and which was relied on in *Cunard* itself, it was said that preliminary resort to the Commission "is required because the inquiry is essentially one *of fact and of discretion in technical matters and uniformity can be secured only if its determination is left to the Commission.*"

69. Here the most that can be claimed is the construction of a contract, a typical question of law for a court. *Cf. New York, Susquehanna etc. Co. v. Follmer*, 254 F2d 510, 513 (Cir. 3). Cf. *Packaged Programs v. Westinghouse Broadcasting Co.*, 255 F2d 708 (Cir. 3).

"It is true that uniformity is the paramount purpose of the Commerce Act. But it is *not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission* to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal law. If the parties properly preserve their rights, a construction given by any court, whether it be Federal or state, *may ultimately be reviewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured.*" (P. 290)

This language was quoted and applied in *Pan American Pet. Corp. v. Superior Court*, 366 US 656, 665, where the court brushed aside the claim that state court decisions of federal questions might destroy uniformity saying that "the right to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions."

Very recently, in the *Meat Cutters Case*, p. 73 above, this Court said:

"Nevertheless, for the reasons stated below we cannot conclude that this is a proper case for application of the doctrine of primary jurisdiction.

"To begin with, courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment. Just such a determination must be frequently made when a court's jurisdiction to issue an injunction affecting a labor dispute is challenged under the Norris-LaGuardia Act, which defines "labor dispute" as including "any controversy concerning terms or conditions of employment," Norris-LaGuardia Act § 13 (c), 27 Stat. 73, 29 U. S. C. § 113(c) (1958 ed.). See *Order of Railroad Telegraphers v. Chicago & N. W. R. Co.*, 362 U. S. 330; *Bakery Sales Drivers Local v. Wagshal*, 333 U. S. 437; cf. *Teamsters Union v. Oliver*, 358 U. S. 283.

> "Secondly, *the doctrine of primary jurisdiction is not a doctrine of futility;* it does not require resort to 'an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.' *Federal Maritime Board v. Isbrandtsen Co.,* 356 U. S. 481, 521 (Frankfurter J., dissenting)."

Secondly, where (as here) there is no action which could be taken by the Commission which would be of any aid to the court, there is no room for application of the primary jurisdiction doctrine. (Cf. *U. S. v. The Philadelphia Nat. Bk.,* above.) So where the matter has been passed upon by the Commission, no further Commission action is needed and there is no reason why the court should not proceed forthwith. *U. S. v. Western Pac. R. Co.,* 352 US 59, 69, said:

> "Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it."[70]

The court cited *Crancer v. Lowden,* 315 US 631, which was just such a case. There having been a prior construction by the Commission, *Crancer* held that the court action might proceed even though there was a second proceeding then pending before the Commission because:

> "Nothing involved in the pending administrative proceeding before the Interstate Commerce Commission was *essential* to the determination of the issue in this suit."

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70. Compare holding that a Clayton Act § 4 treble damage action should proceed and quoting and applying this language where "The flip system thus already has achieved both an administrative and a court status of illegality. From this it follows * * * (2) that there is no need for further administrative expertise on this issue; and (3) that the problem of uniformity, so often troublesome and persuasive in rate cases, is not present." (*McCleneghan v. Union Stock Yards Co.,* 298 F2d 659, 668 (Cir. 8))

Thirdly, the only administrative action on which a court should wait, is *lawful* action. This results logically and from the holding in *Penn. R. Co. v. United States,* 363 US 202, that if a stay of court proceedings waiting upon administrative action was proper, that stay should remain in effect until the administrative proceeding was *finally* determined by the conclusion of all review proceedings.

It follows from the foregoing, and, indeed, this is the holding of the cases, that where an administrative agency can take no action (*Georgia v. Penn. R. Co.,* 324 US 439; the *Meat Cutters Case,* 381 US 676, 14 L ed 2d 640, 648[71]) or can not give *all* the relief to which a party is entitled the courts are free to entertain an action. (*Hewitt-Robins, Inc. v. Eastern Freight-Ways Inc.,* 371 US 84;[72] *Panagra,* 371 US 296, note 19.[73])

Finally, all of the earlier cases, *Cunard* and *Far East Conference* included, must be read as limited by *California v. Federal Power Commission,* 369 US 482, and its holding that antitrust issues are *not* administrative matters unless made so by the regulatory statute, and that when not made matters for administrative handling (or at least involving such matters) the courts must proceed to their determination:

71." '[W]e know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose.' *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co.,* 341 US 246, 254 95 Led 912, 920, 71 SCt 692."

72. *Pensick & Gordon, Inc. v. California Motor Express,* 302 F2d 391 (Cir. 9); remanded "for further consideration in the light of *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.,*" 371 US 184; 323 F2d 769 (Cir. 9) remanding to the District Court to proceed to the merits, cert. den. 375 US 984.

73. "If it were clear that there was *a* remedy in this civil antitrust suit that was *not available* in a § 411 proceeding before the C. A. B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 US 84, where litigation is held by a court until the basic facts and findings are first determined by the administrative agency, *so that the judicial remedy not available in the other proceedings, can be granted.*"

Cf. *Heisler v. Parsons,* 312 F2d, 172, 176 (Cir 7); *U. S. v. Research Laboratories,* 126 F2d 42, 45, col 2 (Cir 9).

"Here, as in United States v. Radio Corp. of America, 358 US 334, while 'antitrust considerations' are relevant to the issue of 'public convenience and necessity' (id. 358 US at 351), there is no 'pervasive regulatory scheme' (ibid.) *including the antitrust laws* that has been entrusted to the Commission. And see National Broadcasting Co. v. United States, 319 US 190, 223, 87 L ed 1344, 1366, 63 S Ct 997. Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as § 5(11) of that Act specifically provides that the carriers involved 'shall be and they are hereby relieved from the operation of the antitrust laws. . . .' See McLean Trucking Co v. United States, 321 US 67, 88 L ed 544, 64 S Ct 370.

* * * *

"It is not for us to say that the complementary legislative policies reflected in § 7 of the Clayton Act on the one hand and in § 7 of the National Gas Act on the other should be better accommodated. *Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency.* Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. *The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to courts is in practical effect taken over by the Federal Power Commission.*"

Compare *The American Ship Building Co. v. N.L.R.B.*, 379 US 814, quoted at p. 28 above and note 24, p. 28 above.

These cases give real point to the *caveat* of *United States v. Western Pac. R. Co.*, 352 US 59, 69:

"No fixed formula exists for applying the doctrine of primary jurisdiction. *In every case the question is whether the reasons for the existence of the doctrine are present* and whether the purposes it serves will be aided by its application in the particular litigation. * * * We adhere to the distinctions laid down in *Great Northern R. Co. v. Merchants Elevator Co.*,

supra, which calls for *a decision based on the particular facts of each case.*"

Under these cases the District Court should have proceeded to the determination of the claim of Petitioner, Carnation Company. There were no questions presented calling for special knowledge or expertise. The only possible questions were the meaning of agreement No. 8200, a typical question for courts (*Great Northern R. Co. v. Merchants Elevator Co.,* above), whether the unapproved secret side agreement was made and whether the raise in rate of $2.50 per ton was made and kept in effect under it. These are typical antitrust questions. Whether the secret side agreement was or was not approved is likewise one for the court under *United States v. Borden Co., Socony-Vacuum, Kempner v. FMC,* 313 F2d 586 (Cir. Dist. Col.), c.d. 375 US 813 and the other cases, p. 63 ff above. If it was not approved there is no action the Commission can now take to affect Petitioner's rights to some relief, any more than it could retroactively wipe away the criminal stains of the defendants' unlawful conduct. Not only can the Commission not award the full relief to which Petitioner is entitled but if the court does so its money award will no more upset any statutory scheme than would the award of reparations by the Commission and here, where there is no question of what a reasonable rate would be but only whether the increase of $2.50 per ton was illegal, there is no more likelihood of different results as between different shippers with jury trials in Clayton Act § 4 actions than with jury trials under Shipping Act, 1916 § 30. If the results turn out to be not entirely consistent, but still sustainable, that must be laid to the workings of the Seventh Amendment. Neither acts of Congress nor judicial doctrine can override its demands.

The short of the case appears in this language from *United States v. R.C.A.,* above p. 70, at p. 350:

"Thus, there being no pervasive regulatory scheme, and no rate structure to throw out of balance, sporadic action by federal courts can not work mischief. The justification for primary jurisdiction accordingly disappears."

2. Cunard, Far East Conference, Isbrandtsen and Panagra

It remains to consider *Cunard* and *Far East Conference* (a) in the light of the rule that they are not to be read more widely than their facts require, both under the general rule of interpretation of judicial decisions[74] and under the special rule in this field that the Court is not making broad general holdings but is making its decisions "based on the particular facts of each case" (*United States v. Western Pac. R. Co.*, p. 79 above), (b) to consider them "as explained in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481, 497-499." (to borrow the language from *United States v. R.C.A.*, quoted at p. 71 above) and (c) to consider them in view of the holding in *Panagra* and its very careful excising from that holding of a number of matters including that now presented, the availability of Clayton Act § 4 treble damage civil actions based on activities of defendants in regulated industries (see p. 91 below).

U. S. Nav. Co. v. Cunard S.S. Co., 284 US 474, was an action by a steamship company against competitors for *injunctive relief* against claimed violations of the Sherman Act,—a conference scheme of dual rate contracts, by which 2 rates were set up and a shipper who agreed to use exclusively conference bottoms could obtain the lower rate, etc. It was held that the district court properly dismissed the action.

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74. The settled rule is that language of a decision is not to be given a wider reading than is called for by the question that was presented for decision. (*Cohen v. Virginia*, 6 Wheat. (US) 264, 399, quoted, among other places in *Osaka etc. Line v. U. S.*, 300 US 98, 103; *German Alliance etc. v. Home etc. Co.*, 226 US 220, 234; *Puerto Rico v. Shell Co.*, 302 US 253, 269.)

The court said that only a few cases need be noted and started with extended quotation from *Great Northern R. Co. v. Merchants Elevator Co.*, p. 68 above, a case that involved "no question of fact, either as an aid to the construction, or in any other respect, and no question of administrative discretion". It then noticed the coverage of the Shipping Act, and that carriage by water "involves questions of exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge" and may depend on facts peculiar to the business or its history "unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced". [This well might be true of the propriety of a dual-rate structure (*sed quaere* under *Isbrandtsen Co.*, 356 US 481, below) but it is certainly not true of whether there was an anti-trust conspiracy to fix prices.] The opinion further said that the charges made "either constitute direct and basic charges of violations" of the Shipping Act or are "so interrelated with such charges as to be in effect a component part of them". It was held, and the exact language of the court should be carefully noticed, that:

> "the remedy is that afforded by the Shipping Act, which to *that extent* supersedes the anti-trust laws."

This remedy might well be complete where only relief as to the future is sought because under § 22 a cease-and-desist order could be issued and under § 29 could be enforced directly. Since no relief was sought for *past* acts, but *only in respect to prospective conduct*, failure to file the agreement "will not afford ground for an *injunction*" for the Board was "fully authorized by § 22, supra, to afford relief upon complaint or upon its own motion". There is no language here of repeal, expressly or by implication, nor is there any statement of complete exclusion of the antitrust laws.

It is only "to that extent" that the antitrust laws are superseded.[75]

It was argued that the agreement referred to in the complaint was one which could not be approved. To this the court answered "But this is by no means clear" and went on to spell out reasons for believing that there was room for action by the administrative agency.

Nothing in *Cunard* stands as an impediment to court action where, as here, the only question is one of law, and there is no action which the Commission could take which would resolve any issue tendered to the court, the matter presented rests in the past, within the traditional functions and competency of a court and does not require for its resolution any "expertise" and granting of relief by an award of damages will not be so disruptive of the Shipping Act scheme that moritorium legislation will be needed.[76] *Cunard* is explained fully by "the particular facts" of that case. The case, whether right or wrong in view of *Isbrandtsen*, 356 US 581, goes on the ground that an *injunction* would have interfered with the performance by the Board of its functions *in respect of the very matters complained of*, and in this at least history has shown that the court was correct.[76] And *Isbrandtsen*, if it does nothing else, demonstrates that the Commission is not given the last word on matters that may fall within the Act and that the doctrine that *Cunard* was applying was the "primary jurisdiction doctrine", as it has been fully explained by the cases; that it was the nature of the question there involved that warranted referral to the Commission. There the Commission could act,

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75. The same language is italicized by *S. S. W., Inc. v. Air Transport Ass'n*, 191 F2d 658, 661 (Cir Dist Col), when it quotes *Cunard*, a matter of significance since *S. S. W.* made a distinction between injunctive relief and relief by way of treble damages and concluded that by the Civil Aeronautics Act "Congress did *not intend to deprive an air carrier of its right to seek treble damages for violation of the antitrust laws*" a conclusion which now seems unassailable in view of *Hewitt-Robins v. Eastern Freight-Ways*, 371 US 84 and *Panagra*, p. 89 ff below.

76. See footnotes 16 and 40 pp. 15 and 41 above.

its action could achieve all of the results an action for an *injunction* could achieve and *injunction* granted to one suitor, with its prospective operation, might seriously disrupt the future working of the statutory scheme or be only an idle act if Commission action could nullify it. The point to be seized is that there is a vast difference between prospective relief in specie and an award of damages for past conduct in violation of the antitrust statutes into which no amount of Commission action could breathe legality. It is believed, with deference, that it is here the court below fell into error. This is indicated by its repeated references (R 167 (end of note 10), 173, note 19 at p. 175, 176, 187) to the language of *Cunard*, that "it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." However proper such reasoning may have been in *Cunard* where the whole problem looked only to the future it has no proper place in this case.[77] Approval could not work retroactively to cure the illegality (*River Plate etc. Conference v. Pressed Steel etc. Co.*, 227 F2d 60 (Cir. 2); cf. *Kempner v. FMC*, 313 F2d 586 (Cir. Dist. Col.), c.d. 375 US 813) any more than if the Government were prosecuting criminally (see *Panagra*, below).

Far East Conference v. United States, 342 US 570, was an action by the United States to *enjoin* violation of the Sherman Law. Again the attack was on a dual rate system. As in *Cunard* the *only* relief asked was *prospective* in operation and might interfere with Board action. Resting on primary jurisdiction and *Cunard*, the court held that the issue should first go to the Board. Its explanation of *Cunard* is interesting and makes it clear that

77. The court below, in the next to the last paragraph of its opinion (R 187), again quotes this language from *Cunard* and in immediate sequence adds: "We would assume that if such action were taken by the Commission no antritrust proceedings would be in order." But the Shipping Act, 1916, has not authorized, if it could, retroactive approvals which will wash out past antitrust violations.

Cunard was *not* a case of repeal or sole remedy, but only of prior application. Indeed, *Cunard* really so explains itself by its reliance on *Great Northern v. Merchants Elevator. Far East* said of *Cunard:*

> "The Court thus applied a principle, now firmly established, that in cases raising issues of fact *not within the conventional experience of judges* or cases requiring the exercise of administrative *discretion,* agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence *serve as a premise for legal consequences to be judicially defined.*"

There is nothing to indicate that the doctrine there applied would operate where the question presented is solely one of law, or where there is nothing which the administrative agency can do to affect the result, where the court is concerned only with past conduct and where no relief sought will embarrass future Commission action. *Far East* was only applying a doctrine which would *suspend* court action to allow the administrative agency to act *if* there were an "administrative question", the court then to act if there was *further* relief *to which the plaintiff was entitled.* Any doubt about this is resolved by the reasons given for holding that in the circumstances of *that particular case* as it *then* presented itself, the action should be dismissed rather than be held pending Commission action. The court expressly recognized that the problem was *not one of sole or exclusive remedy* but merely one of adjustment by waiting to see what would happen. It said:

> "Having concluded that initial submission to the Federal Maritime Board is required, we may *either* order the case retained on the District Court docket pending the Board's action (citing the two *El Dorado* cases) *or* order dismissal of the proceedings brought in the District Court."

If the *sole* remedy were under the Shipping Act and by the Commission the court had *no* choice to retain or dismiss. It ordered it dismissed only because in the situation then presented action by

the agency might dispose of the matter. However, it expressly recognized that if further relief were necessary *it could be had in a new action.* The Court reasoned:

> "If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application. (Citation) We believe that no purpose would here be served to hold the present action in abeyance in the District Court while the proceedings before the Board and subsequent judicial view or enforcement of its order are being pursued. *A similar suit is easily instituted later, if appropriate.*"[78]

There is nothing in the majority opinion which remotely suggests that if there were no effective action which the Commission could take by subsequent approval which would obviate court action the court action should be dismissed or delayed. And, this is just what Mr. Justice Frankfurter, the author of that opinion, in effect said in his dissent in *Isbrandtsen,* 356 US 481.

In the light of later decisions it must be noticed that Mr. Justice Clark did not participate in *Far East* and that Mr. Justice Douglas, with whom Mr. Justice Black concurred, dissented. The point of the dissent was that the dual rate agreement could have been immunized from the operation of the Sherman Act if it had been submitted to the Board and approved.

> "But that exemption from the Sherman Act can be acquired only in the manner prescribed by § 15. Here no effort was made to obtain it. Hence the petitioners are at large, subject to all of the restraints of the Sherman Act.
>
> "Why should the Department of Justice be remitted to the Board for its remedy? The Board has no authority to enforce the Sherman Act. * * *.

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78. As to suspension rather than dismissal being the appropriate remedy see *General American Tank Car Corp. v. El Dorado Terminal Co.,* 308 US 422 and its citation in *United States v. Western Pac. R. Co.,* p. 70 above; *Mitchell Coal & Coke Co. v. Penn. R. Co.,* 230 US 247; *McClenghan v. Union Stock Yards Co.,* 298 F2d 659, 670 (Cir. 8); *Panagra,* quoted in note 82 at p. 90 below.

> "Petitioners, therefore, operate outside the law not only because they have failed to submit their schedule of rates to the Board but also because the rates adopted would, if approved, be illegal."

To this last statement is added a footnote: "There is less room for expertise for the rates used by the steamship companies are unfiled rates or unlawful rates." The opinion concludes:

> "The jurisdiction of the Department of Justice must commence at this point, unless we are *to amend the Act by granting an anti-trust exemption* to rate fixing not only when the rates are filed by the companies and approved by the Board *but also when they are not filed at all or are rates which, if filed, could not be approved. I would read the Act as written and require the steamship companies to obtain the anti-trust exemption in the precise way Congress has provided.*"

This is sound doctrine under *United States v. Borden Co.*, p. 64 above.

The significance of this language from the dissent will become more apparent when *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481 is considered, particularly as the holding is pointed up by the dissent of Mr. Justice Frankfurter who wrote the majority opinion in *Far East Conference*.

Federal Maritime Board v. Isbrandtsen Co., 356 US 481, is the next chapter although that was not a primary jurisdiction case but one of direct review of a Board order. The dual rate structure was again under attack. The Federal Maritime Board had approved a system. Isbrandtsen Co. initiated review and the Court of Appeals set aside the Board's order on the ground that the system was illegal *per se*. This Court affirmed. The argument that the decision was foreclosed by *Cunard* and *Far East Conference* was rejected. The Court stated the holding of *Cunard* to be that

> "the questions raised by this complaint were within the primary jurisdiction of the Shipping Board and therefore the court could not entertain the suit *until* the Board had considered the matter."

It said that *Far East Conference* was a similar holding. *There is no suggestion that either case was a sole remedy case.* Both cases are reviewed and quoted and the court then continues:

> "It is, therefore, very clear that these cases, while holding that the Board had primary jurisdiction to hear the case *in the first instance*, did not signify that the statute left the Board free to approve or disapprove the agreements under attack. Rather, those cases recognized that in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed. Compare Denver Union Stock Yard Co. v. Producers Livestock Marketing Asso. 356 US 282, 2 L ed 2d 771, 78 S Ct 738. It is recognized that the courts, while *retaining the final authority to expound the statute,* should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern. Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation.
>
> "Thus the Court's action in Cunard and Far East Conference *is to be taken as a deferral* of what might come to be the ultimate question—the construction of § 14 Third—rather than an implicit holding that the Board could properly approve the practices there involved. The holding that the Board had primary jurisdiction, in short, was *a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court* of the scope and meaning of the statute as applied to those particular circumstances."

This is the explanation of *Cunard* and *Far East* which was thought important enough to be called to attention in *United States v. R.C.A.*, quoted at p. 71 above.

In his dissent Mr. Justice Frankfurter, citing *Cunard* and *Far East,* said that the Court had twice rejected the contention which it now accepts. Speaking of those cases he too recognized that "the immediate issue in both cases was, of course, the applicability of the principle of 'primary jurisdiction' ". But he objected to the present holding because, so he said, those cases were not designed to give courts jurisdiction "on condition that they use the administrative agency as a sterile conduit to them." He is saying that the doctrine of those cases did not contemplate the necessity of going to the administrative agency *where there was nothing the administrative agency lawfully could decide.* He made this explicit further saying:

> "Contrariwise, where a decision of a case depends on *determination of a question of law as such,* either because of explicit statutory outlawry of some specific conduct or by necessary implication of judicial power because not involving the exercise of administrative discretion or the need of uniform application of specialized competence, *the doctrine of primary jurisdiction has no function, because there is no occasion to refer a matter to the administrative agency.* Great Northern R. Co. v. Merchants Elevator Co. 259 US 285, 66 L ed 943, 42 S Ct 477 (reaffirmed in United States v. Western Pacific R. Co. 352 US 59, 69, 1 L ed 2d 126, 135, 77 S Ct 161); Texas & P. R. Co. v. Gulf, C. & S. F. R. Co. 270 US 266, 70 L ed 578, 46 S Ct 263; Civil Aeronautics Board v. Modern Air Transport, Inc. (CA2NY) 179 F2d 622, 624; see Davis, Administrative Law 666-668."

And then Mr. Justice Frankfurter said even more significantly:

> "It would be a travesty of law and an abuse of the judicial process to force litigants to undergo an expensive and merely delaying administrative proceeding *when the case must eventually be decided on a controlling legal issue* wholly unrelated

to determinations for the ascertainment of which the proceeding was sent to the agency."[79]

This reasoning has been approved by quotation in the *Meat Cutters Case,* p. 76 above. What the author of the opinion in *Far East Conference* then points up is the significance of the dissent in *Far East Conference:*

"And in Far East Conference, the claim that now prevails was a main ground of dissent."

These cases in effect find their summing up in the holding and exception in *Panagra, Pan American World Airways v. United States,* 371 US 296. This was a civil suit by the United States for *injunctive* relief charging violations of the Sherman Act in what amounted to division of territory and routes and monopoly in foreign air commerce with South America, presenting what the court characterized as "narrow questions" which, by the Civil Aeronautics Act superseded in 1958 by the Federal Aviation Act, 49 USC § 1301 ff, had been entrusted, so the Court held, to the Civil Aeronautics Board.[80]

"Limitation of routes and division of territories and the relation of common carriers to air carriers are basic in this regulatory scheme.[81] The acts charged in this civil suit as anti-trust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending or rejecting them, and in allowing or disallowing affiliations between common carriers

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79. Indeed, he says that to require resort to the Commission on a question which the court can decide *as a matter of law* "is a form of playfulness" and in such case resorts to the Commission are "utterly wasteful futilities." Cf. the *Meat Cutters Case,* quoted at p. 76 above.

80. The Court said that the legislative history indicated that the "Board was to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned."

81. Contrast the case at bar which has to do with fixing rates which is no part of the Commission's authority. (See p. 34 above)

82. In *U. S. v. Philadelphia Nat. Bk.,* 374 US 321, the court indicated that what was said in the language just quoted was basic to the decision of the case and stated that *Panagra* held that because the Board "had been given broad" powers to enforce the competitive standard clearly delineated

> and air carriers.[82] The case is therefore quite unlike Georgia v. Penn R. Co., 324 US 439 * * * in view of the fact that the Interstate Commerce Commission had no power to grant relief[81] * * *"

Under the Civil Aeronautics Act the "industry has been regulated to a regime designed to change the prior competitive system"; "limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme"; "Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry" and it, "in regulating air carriage is to deal with at least some antitrust problems."[83] It was said that the "regime" of the statute "has its special standard of the 'public interest' as defined by Congress" and "it would be strange indeed if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations". The Court reinforced its conclusion by pointing out that not only had "the narrow questions presented by this complaint been entrusted to the Board" but that they presented problems that were beyond the field of judicial action and strange to judicial competency for

> "many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military

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by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied "to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers." Indeed, in *Panagra* itself, footnote 19, the court said:

> "If it were clear that *there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C.A.B., we would have the kind of problem presented in Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 US 84, 9 L ed 2nd 142, where litigation is held by a court until the basic facts and findings are determined by the administrative agency, *so that the judicial remedy not available in the other proceeding, can be granted.*"

83. "Pooling and other like arrangements are under the Board's jurisdiction by reason of §412. Any persons affected by an order under §§ 408, 409 and 412 is 'relieved from the operation of the "antitrust laws",' including the Sherman Act. § 414. The Clayton Act, insofar as it is applicable to air carriers, is enforceable by the Board."

> and foreign policy considerations that the Act, as construed by a majority of the Court in Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 US 103, 92 L ed 568, 68 S Ct 431, *subject to presidential, rather than judicial review.* It seems to us, therefore, that the Act *leaves to the Board under § 411 all questions of injunctive relief* against the division of territories or the allocation of routes or against combinations between common carriers and air carriers."

There was such an overlapping with the antitrust statutes that *injunctive* action by the courts could very well result in a head-on conflict with the scheme of the Civil Aeronautics Act and the functioning of the Board to the point where action by the courts "would in effect deprive the subsequent statute of its efficacy" and "render its provisions nugatory". (Cf. p. 50 above) The Court was careful to point out "that the power of the Board to issue a 'cease and desist order' " was broad enough "to compel divestiture" for "where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand."[84] But the Court was very careful expressly to point out that to the extent the subject was *not* governed by the Aviation Act and remedies under that Act were *not* so broad as to give *all of the relief that could be obtained under the antitrust statutes,* the antitrust statutes were *not* superseded. The Court said:

> "No mention is made of the Department of Justice and its role in the enforcement of the antitrust laws, yet we hesitate here, as in comparable situations, to hold that the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—*absent an unequivocally declared congressional purpose so to do.* While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, *those expressly entrusted to*

84. See note 82 above.

> *it encompass only a fraction of the total.* Apart from orders which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. Cf. United States v. Pacific & A.R. & N. Co., 228 US 87, 105 L ed 742, 748, 33 S Ct 443. *Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined.* We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce."

We suggest, with deference, that in *Panagra* this Court has made for us the distinction we are endeavoring to make between this case and *Cunard* and *Far East Conference* and that whether or not, in the light of *Isbrandtsen Co.*, 356 US 481, they would be decided the same way today, they do not apply here.

3. United States v. Borden Co. and Great Northern v. Merchants Elevator Rule This Case, Not Cunard and Far East Conference

It is submitted that *United States v. Borden Co.*, and similar cases (p. 63 ff above) and *Great Northern v. Merchants Elevator*, p. 74 are controlling here. Enough has been said about *United States v. Borden Co.* A few things should be added about *Great Northern v. Merchants Elevator.* That, like this, is a simple overcharge case. Here, as there, there is no question of the reasonableness of the rate. There the claim was simply that too much was charged because the tariff was not properly read. Here it is claimed that too much was charged because a $2.50 per ton increase was illegally imposed.

There is here no claim of discrimination. There is no claim of an unreasonable rate. No such claim could be made under the Shipping Act as to *foreign* commerce. No fact finding is necessary to know what the "lawful" rate was.

PWC was formed under approved Agreement No. 57 *for the purpose of fixing rates* for its members from Pacific Coast ports to the Far East. Under that agreement, PWC *did in fact, in 1951, fix the rates for evaporated milk* to the Philippine Islands. These were the only lawful rates. Pursuant to the 1953 illegal combina-

tion and agreement, the defendants (not PWC) agreed that there should be collected *$2.50 per ton more than the rate lawfully fixed by PWC. This was in fact done.* The relief sought is the recovery of the amount of this *overcharge* trebled because it was exacted as a result of violation of the antitrust statutes. There is no question of fact, or of administrative discretion for the Commission, or any question not familiar in any antitrust suit. (See, among others, the *Meat Cutters Case*, pp. 75, 76, above; *McClenegban*, note 70, p. 76 above; *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F2d 708 (Cir. 3); *New York, Susquehanna etc. R. Co. v. Follmer*, 254 F2d 510 (Cir. 3).)

There is far less in the Shipping Act as an impediment to an action to collect an unlawful overcharge in *foreign* commerce than there is in the Interstate Commerce Act. It is established that even where the Interstate Commerce Act applies resort need not be had to the Commission, an action can be maintained to collect an overcharge, certainly where there is no question of construction of a tariff and the claim is merely of collection of $2.50 per ton more than the amount specified in the lawful tariff (*Penn. R. Co. v. Int. Coal In. Co.*, 230 US 184; *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285; *Ingalls v. Maine C. R. Co.*, 24 F2d 113 (D. Me.). Cf. *Pan American P. Corp. v. Superior Court*, 366 US 656; *Crancer v. Lowden*, 315 US 631; *Turner etc. Co. v. Chicago etc. Ry. Co.*, 271 US 259, 262; *St. Louis etc. Co. v. Hasty & Sons*, 255 US 252, 256; *Davis v. Parrington*, 281 Fed 10, 14 (Cir. 9) and the following undercharge cases: *Chesapeake etc. R. Co. v. International Harv. Co.*, 272 F2d 139, 142 (Cir. 7); *U. S. v. Louisville & N. R. Co.*, 221 F2d 698, 703 (Cir. 6); *Bernstein etc. Co. v. Denver etc. R. Co.*, 193 F2d 441, 444 (Cir. 10)). If the illegality springs from violation of the antitrust statutes the source of the illegality is traditionally justiciable and not administrative (*California v. F. P. C.*, above).

This is even a simpler case than *Great Northern R. Co. v. Merchants Elevator Co.* In that case there was a question of construction of a tariff. There was no need to resort to the

Commission because that was a question of law. *In the case at bar there is no need for construction of a tariff at all.* We make a case *without regard for the tariff terms,* because *we are concerned only with the illegal charge of $2.50 per ton above the lawful tariff whatever that tariff is.* (Cf. *Davis v. Parrington,* above p. 93, where the short haul charge was more than for a long haul and this was lawfully only by Commission permission.) But if our case presented a new question, to be tested, step by step, for application of the primary jurisdiction doctrine it meets every test for rejection of the doctrine and denial of the defendants' motions. There is no question of fact calling for handling of peculiar or complicated industry facts or practices or the assembly and appraisal of a mass of statistical or other data. There is no question of reasonableness or discrimination. The only possible questions (if indeed *any* issue can be made—the facts are matters of records) are these:

1. Was there an agreement, as alleged, to fix rates not in the way provided in the PWC agreement No. 57, but by all the defendants;—was there a "side" "combination" or "conspiracy" as alleged? This is the sort of question courts traditionally handle under the antitrust statutes. (Cf. *Anglo Canadian S. Co. v. United States,* 264 F2d 405, 414 note 15 (Cir. 9)).

2. If there were such an agreement or combination was it approved? This is a simple yes or no question. It was not approved.

3. If the agreement was not approved was it illegal? This, as to price and rate fixing, is not a question of fact but one of law. Such agreements are illegal *per se.* (See p. 6 above). This is settled. *Georgia v. Penn. R. Co.* settles it that even a mere veto power over a change in rates falls within the rule.

4. Was the plaintiff damaged and if so in what amount? Again there is no administrative question. It is a typical antitrust suit (Clayton Act § 4) question. The lawful rate was raised $2.50 per ton by the illegal arrangement.

These are all questions for courts.

The Meat Cutters Case, p. 75 above;
Great Northern v. Merchants Elevator, p. 92 above;
Trans World Airlines v. Hughes, 332 F2d 602, 609 (Cir. 2), cert. gr. and dis. as improv. granted;
New York, Susquehanna, etc. Co. v. Follmer, 254 F2d 510 (Cir. 3);
Packaged Programs, p. 93 above; *McCleneghan*, note 70, p. 76 above;
River Plate Conference, p. 96 below.

There is no possibility that the granting of relief in this case will work any want of uniformity of rate or will interfere with the operating of the Shipping Act or the Commission's functioning under it. Rather the case is like one of a charge over and above a Commission approved rate under the Interstate Commerce Act or like an overcharge over the only published and hence the only lawful rate under that Act. Such relief can always be given by the courts. This Court pointed out in the *Meat Cutters Case* that though a question may be one which a "Board frequently determines" it may be one as to which "courts are themselves not without experience." Such questions provide no reason for by-passing the judicial function.

4. Other Cases Under the Shipping Act

There should be considered the few decisions of other courts involving the Shipping Act and unapproved agreements and a few cases sometimes cited but which really have no bearing.

Isbrandtsen Co. v. United States, 211 F2d 51 (Cir. Dist. Col.), c.d. 347 US 990. The Japan-Atlantic and Gulf Freight Conference filed with the Federal Maritime Board a proposed dual rate schedule. The Board issued an order permitting the proposed dual rate to go into effect in 48 hours. The order was set aside and an injunction issued until the Board approved the agreement.

Attention was called to the Interstate Commerce Act where rates go into effect upon filing.

> "In marked contrast, as we have seen above, the Shipping Act which governs here contemplates *an entirely different scheme of regulation.* It makes orders with respect to agreements unlawful until approved. This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing *that which would otherwise be illegal under the anti-trust laws.* The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinizes the agreement to make sure that the conduct thus legalized *does not invade the prohibitions of the anti-trust laws any more than is necessary* to serve the purposes of the regulatory statute.[85] *But until this is done, the agreement is subject to the operation of the anti-trust laws,* under which price fixing agreements are illegal *per se.*"

The court is stating for the Shipping Act the rule now approved by this Court, that where a statute provides a method for obtaining an exemption from the antitrust statutes, the exemption can be obtained only in the way the statute provides. (See p. 62 ff above).

In *Pacific Westbound Conference v. Leval & Co., Inc.,* 201 Ore. 390, 269 P2d 541 defendant shipper violated a dual rate contract and the conference plaintiffs sued. It was held that the dual rate structure did not fall under the Conference Agreement so that Conference Agreement approval carried approval of the dual rate structure. The court said it was impressed by the reasoning in *Isbrandtsen Co. v. U. S.,* 211 F2d 51, 57 (Cir. Dist. Col.), which is quoted, and pointed out that conduct "that would be unlawful under" the antitrust statutes is to be permitted "only under due and proper supervision." Recovery was denied because the contract was unlawful. Will it be suggested that the result is wrong because the Commission had not first determined this simple question of law? The next case holds to the contrary.

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85. See *McLean Trucking* and *Minneapolis & St. L. R. Co.*, p. 63 above.

In *River Plate etc. Conference v. Pressed Steel etc. Co.*, 227 F2d 60 (Cir. 2) decided, it will be noticed, after the decision of the Second Circuit in *American Union Transport*, below, the defendant shipper also failed to comply with an exclusive shipping agreement under a dual rate structure. The defense argued the agreement was illegal, not having been approved by the Board. Summary judgment for the defendant was affirmed. Thereafter plaintiffs moved to stay proceedings pending conclusion of proceedings before the Board and the Board moved to intervene. The motions were denied and summary judgment granted by the same order. Approval *"could not come subsequently, or retroactively,* or by some interpretation of the Board made long after the event." The language of § 15 is "clear and categorical". The contract was clearly unlawful. The court cites *Isbrandtsen Co. v. U. S.*, 211 F2d 51 and *Pacific Westbound Conference v. Leval & Co.*, 201 Ore. 290, and goes on:

> "This case presents no questions for determination by a Board of special competence to which Congress has committed questions requiring administrative expertise. *When all that remains is for the Court to say what the plain words of the statute mean and whether the Board has acted, the doctrine of primary jurisdiction does not apply."*

The court said that *Cunard* and *Far East Conference* each involved factual issues within the special competency of the Board and pointed out that for the matters presented in those cases the remedies under the Shipping Act (cease-and-desist orders) were "virtually coextensive with those under the antitrust laws" (injunction).

Of the cases looking the other way only one calls for any real attention, *American Union Transport v. River Plate & Brazil Conference*, 126 F Supp 91 (S.D. N.Y.), aff'd 222 F2d 369 (Cir. 2,—per curiam). The only opinion is that of the trial court. The case was said to be a treble damage suit under the antitrust laws. Plaintiff was a freight forwarder. Defendants were members of

a steamship conference. It was alleged that the conference members agreed that no member would pay any brokerage on a particular shipment; that the agreement had not been approved under the Shipping Act and was not excepted from the antitrust laws, but it was also asserted that the agreement was "unlawful under the *decisions, rules and orders issued by the Board* and sustained by the courts." The Board had authority to regulate freight forwarders and brokers and *by a general order it had provided for registration and regulation of freight forwarders and brokers* and had undertaken *to regulate the payment and collection of brokerage.* Accordingly, as one ground of decision, and it would seem a sufficient ground, the court said:

> "Although the court is not asked for injunctive relief, it is not at all clear that judicial intervention in this field even to the extent of trying a case for damages would not interfere with the uniformity of treatment and the regulatory policy of the board based on specialized considerations within its exclusive competence."

As to this the case may be right or wrong, but such a ground of decision is without significance in the case at bar.[86] The court's language did, however, go beyond this. It recognized the strength of the argument in the dissenting opinion in *Far East Conference v. U. S.*, 342 US 570 (p. 85 ff above), but felt bound by "the language of the Supreme Court in the United States Navigation case" (the *Cunard* case) and unable to accept the position of the dissent in *Far East Conference* that want of approval set the matter at large for operation of the antitrust laws, although it said the argument based on the theory of the dissent and the factual distinction that no injunctive relief was being sought "is appealing."

A number of things can be said of this case. In the first place the claim of violation of regulations under the Act and that the

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86. The later history of the controversy demonstrates that here was the real heart of the controversy. *American Union Transport, Inc. v. United States and FMB*, 257 F2d. 607 (Cir. 2), c.d. 358 US 828.

case involved consideration of the regulation of forwarders and brokers under the Act distinguishes the case. The opinion does not tell us anything of the factual situation of forwarders and brokers or that absent the alleged unapproved agreement there was any right to brokerage or forwarding charges, or why the agreement was illegal or the basis for computing damages, if any. There is nothing to indicate that the factual situation was the simple one that we have here of an illegal overcharge. But the thing that throws the greatest cloud on the case is that was decided in 1955 and that the courts did not have the benefit of the later decisions of this Court beginning with *Federal Maritime Board v. Isbrandtsen Co.*, p. 86 ff above (decided 1958), which have so thoroughly vindicated and confirmed the position taken in the dissenting opinion in *Far East Conference,* particularly the position that exemption from the antitrust statutes can be obtained under the Shipping Act only by the method provided in that Act, i.e., approved by the Commission, or of the Second Circuit's own opinion *River Plate Conference* p. 97 above. The real difficulty with the opinion is that it reads *Cunard* as a decision establishing a sole remedy theory whereas, the *Federal Maritime Board v. Isbrandtsen Co.* pointed out "the Court's action in Cunard and Far East Conference is to be taken *as a deferral* of what might come to be the ultimate question", an explanation of *Cunard* and *Far East Conference* which the court accepted in *United States v. R. C. A.* (see p. 71 above).

The remaining cases can be disposed of shortly.

Rivoli Trucking Corp. has been a persistent suitor. Its action against *New York S. Ass'n,* 167 F Supp 940 (S.D. N.Y.), and the denial of its application for leave to amend upon the ground that it came too late reported in 167 F Supp 943, add nothing. The action was for treble damages, not based upon an unapproved agreement fixing rates which would be illegal *per se,* but on a claim of "lock-out", improper demurrage charges, etc., unreasonable refusal of admission to piers, etc. The case obviously presented questions of fact as to the reasonableness of regulations

and practices required by the Act to be established. The complaint has no resemblance to the case at bar. If there is anything to the primary jurisdiction doctrine at all *Rivoli v. New York S. Ass'n* was a proper case for it.

United States v. Alaska SS Co., 110 F. Supp. 104 (W.D. Wash. 1952) held that *criminal* proceedings under the antitrust statutes were barred by the Shipping Act. With deference the case is clearly wrong. It is critized in *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298, 305 (D.C., Dist. Col.), is drained of all persuasion by the *Panagra* case, particularly the language quoted at p. 91 above, and is obviously out of harmony with *Georgia v. Penn. R. Co.*, above.

Wisconsin & Mich. T. Co. v. Pere Marquette Line Steamers, 67 F2d 937 (Cir. 7), was a typical primary jurisdiction case, where the action was to enjoin proposed steamship operations upon the ground that the ships would be operated as "fighting ships" and the rates to be charged would be "unreasonably low".

Swayne & Hoyt v. Kerr Gifford & Co., 14 F. Supp. 805 (E.D. La.) was another case where an injunction was sought. The nature of the claimed wrongdoing does not appear except from a statement that rights were asserted under the Intercoastal Shipping Act and the Shipping Act. This and the comment that the remedy under Shipping Act § 22 is ample is enough to dispose of the case.

Roberto Hendandez, Inc. v. Arnold Bernstein, etc., 31 F. Supp. 76 (S.D. N.Y.), has no bearing. It was simply a refusal to enforce a Commission reparation order upon the ground it was unsustained. The case has no significance except the holding the Commission does not have the last word, a proposition now thoroughly established by *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481.

U. S. Trucking Corp. v. American Export Lines, 146 F. Supp. 924 (S.D. N.Y.), is equally wide of the mark. The court, exer-

cising its discretion, refused to issue an injunction which, so it was argued, would be in aid of the jurisdiction of the Commission and to preserve the status quo while the Commission acted. No one was contesting the jurisdiction of the Commission.

The unreported decision in *United States v. Pacific Lumber Co., Inc.,* (N.D. Cal.), was in a case charging a conspiracy among dock owners to deny the use of facilities, except that a single dock could be used by one conspirator. The issue was that of discrimination, unreasonable preference and unreasonable regulations and practices, typical administrative questions under the Shipping Act.

United States v. Borax Consolidated, 141 F. Supp. 396 (N.D. Cal.), was a supplementary proceeding for enforcement of a decree. The agreement involved had been approved. "Thus the rate agreement and acts done pursuant to it are, by the Shipping Act of 1916, exempt from the provisions of the Anti-trust Statutes."

IX.

PETITIONER ASKS LEAVE TO CALL ATTENTION TO COMMISSION PROCEEDINGS

Petitioner asks leave to call the Court's attention to the Commission's Report in the proceedings before the Federal Maritime Commission in its Docket No. 872 entitled Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference, and to the portions of the Commission's Report touching on the matters covered by Petitioner's complaint in this action in order that this Court may be brought up to date. For convenience this material is reproduced in the Appendix to this Brief at p. 52 and following. In doing so Petitioner calls attention to the fact that the Report is not final. The circumstances and reasons for this request are as follows:

Petitioner, in its complaint, to meet a possible question of the statute of limitations, pleaded the concealment of the illegal side agreement for the fixing of rates for PWC members, the operation of that agreement and the fixing of rates under it (Complt. pars. 18-27, R 19-24, and authorities in note 17 p. 17 above). Following the usual pleading practice in such cases Petitioner set out how it discovered the fact, and that it discovered the fact through disclosures in the course of a proceeding before the Federal Maritime Board and its successor (Complt. par. 27, R 23, 24). The defendants, in a motion to dismiss, in intervener's answer and in the affidavit of Thomas Lisi, Secretary of the Commission, also called attention to the proceeding, the order instituting it and Petitioner's intervention in the proceeding (R 26-45). This was the status when the judgment was entered in the District Court.

On August 30, 1963, while the appeal from that judgment was pending in the Court of Appeals for the Ninth Circuit the Commission's examiner filed an "initial decision." Appellees called this to the attention of the Court of Appeals. That Court, in its opinion, noticed that decision and noticed material from that "initial decision"; that after extensive sessions the examiner had filed his "initial decision" and that the issues "included in general the matters and claims" in Petitioner's complaint (R 159, 160). The Court quoted the final paragraph of the report (R 176 note 22—a recommendation which the Commission in its report rejected) and again referred to matters said to appear in that Report (R 184 note 28).

On July 28, 1965, after preparation of this brief was on its way, the Commission served its report made on hearing of exceptions to the "initial decision" of the examiner and, in some respects, departing from it. It is material from this report that we have referred to and set out in the Appendix.

The Commission report is not final as this Brief is prepared for the printer. Under Commission Rules § 502.261 ff (46 C.F.R.

§§ 502.261-502.265) the parties have 30 days after service of the Commission's decision within which to apply for reconsideration. Under the Review Act of 1950, 5 USC § 1031 ff a party aggrieved by a final order has 60 days after entry of the order to file, in the Court of Appeals, a petition to review the order. (5 USC 1034; see *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481, 482.)

In a case where it is appropriate for a court, under the primary jurisdiction doctrine, to withhold action pending an administrative determination, its action should be withheld till all proceedings for review of the administrative action are ended. (*Penn. R. Co. v. United States*, 363 US 202). Of course, if, as we believe under *United States v. Borden Co.*, 308 US 188, and *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285, there is no antitrust issue for the Commission to decide, there is no question properly for the Commission so far as this case is concerned and under *California v. Fed. Power Com'n*, 369 US 482 this case can proceed at once.

CONCLUSION

Petitioner's claim, absent something outside the antitrust statutes, is a classical Clayton Act § 4 treble damage action based upon a price fixing agreement, a *per se* violation of Sherman Act § 1. If there is anything significant outside the antitrust statutes it can be only Shipping Act, 1916 as it applies to foreign commerce upon the theory, urged by defendant-respondents, that since they are common carriers by water in foreign commerce the antitrust statutes, are, as to their conduct, "superseded" by the Shipping Act, 1916. Petitioner respectfully submits that "supersession" is only a euphemism for repeal and that

1. The Shipping Act, 1916, does not repeal, generally, *pro tanto*, or by statement of exception the antitrust statutes;

2. There has been no repeal by implication;

3. The Shipping Act, 1916 § 15, expressly provides the only way an agreement, otherwise within the antitrust statutes, can

be exempted from them, and that way is by Commission approval under the Shipping Act, which was not obtained; and

4. Under the "primary jurisdiction" doctrine there was no administrative question for Commission resolution before the court could proceed with Petitioner's action.

By consequence the judgment of dismissal should be reversed and the District Court directed to proceed with this action. But if we are wrong as to this, it still remains that the Commission could not adjudicate the Clayton Act § 4 treble damage issues and the judgment should be reversed, the cause to be held until the Commission determinations have become final, and the District Court should then proceed to appropriate disposition of this case.

It is respectfully submitted that the judgment of the Court of Appeals for the Ninth Circuit should be reversed with directions to reverse the judgment of the District Court with instructions to proceed agreeably to the determinations of this Court.

San Francisco, California, September 17, 1965.

ARTHUR B. DUNNE
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CERTIFICATE OF SERVICE

I, Arthur B. Dunne, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent Carnation Company, Petitioner in the above entitled matter, in whose behalf service of the foregoing brief has been effected as herein stated.

I certify that on or before September 17, 1965, I served the foregoing Brief on behalf of Petitioner upon the respondents and the Solicitor General of the United States by service of three (3) copies upon the Solicitor General of the United States and three (3) on each of the respective attorneys for respondents whose appearances have been entered herein by mailing the same at San Francisco, California, postage prepaid, first class mail, to the addressees in San Francisco, California, and airmail to the other addressees, as follows:

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Appendix

STATUTES

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Appendix

STATUTES

[Copied from U.S.C.]

Sherman Act

§ Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* * * * (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; 15 USCA § 1.)

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890; c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282; 15 USCA § 2.)

§ 8. The word "person", or "persons", wherever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. (July 2, 1890, c. 647, § 8, 26 Stat. 210; 15 USCA § 7.)

Clayton Act

§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-

fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731; 15 USCA § 15.)

Shipping Act, 1916

[Material in brackets was removed by the 1961 amendments and matter in italics was added by those amendments.]

§ 1. When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided,* That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the

United States, or any State, Territory, District or possession thereof, or of any foreign country. * * * (Sept. 7, 1916, c. 451, § 1, 39 Stat. 728; July 15, 1918, c. 152, § 1, 40 Stat. 900; as amended Sept. 19, 1961, Pub. L. 87-254, § 1, 75 Stat. 522; 46 USCA § 801.)

§ 14. No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or

unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. *Provided,* That nothing in this section *or elsewhere in this chapter, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 814 of this title by the regulatory body administering this chapter, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 814 of this title. The term "dual rate contract arrangement" as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree.* (Sept. 7, 1916, c. 451, § 14, 39 Stat. 733; June 5, 1920, c. 250, § 20, 41 Stat. 996; as amended Aug. 12, 1958, Pub. L. 85—826, § 1, 72 Stat. 574; 46 USCA § 812.)

§ 14b. *Notwithstanding any other provisions of this chapter, on application the Federal Maritime Commission (hereinafter "Commission"), shall * * * by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract * * * which is available to all shippers and consignees on equal terms and conditions which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds * * *".* (Oct. 3, 1961 Pub. L. 87-346, § 1, 75 Stat. 762; 46 USC § 813a.)

§ 15. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement [,] with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission [may] *shall* by order, *after notice and hearing,* disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, *or to be contrary to the public interest,* or to be in violation of this chapter, and shall approve all other agreements, modifications [,] or cancellations. *No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independnt action, or (2) in respect to any conference agreement, which fails to pro-*

vide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

[Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.]

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and [All] agreements, modifications, [or] *and* cancellations [made after the organization of the Board] shall be lawful only when and as long as approved by the Commission [, and] before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation [.]; *except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by sections 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.*

Every agreement, modification, or cancellation lawful under this section, *or permitted under section 813a of this title,* shall be

excepted from the provisions of sections 1-11 and 15 of Title 15,* and amendments and Acts supplementary thereto.

Whoever violates any provisions of this section *or of section 813a of this title* shall be liable to a penalty *of not more than* $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451, § 15, 39 Stat. 733; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; as amended Oct. 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763; 46 USCA § 814.)

§ 16. It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employees thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever [.]; *Provided, that within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States*

*Antitrust Statutes, Sherman Act and Clayton Act. See App. p. 1 above.

may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the project, or setting aside the rate, rule, or regulation.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. (Sept. 7, 1916, c. 451, § 16, 39 Stat. 734; June 16, 1936, c. 581, 49 Stat. 1518; as amended Oct. 3, 1961, Pub. L. 87–346, § 6, 75 Stat. 766; 46 USCA § 815.)

§ 17. No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly preju dicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or col lected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the

carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. (Sept. 7, 1916, c. 451, § 17, 39 Stat. 734; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USCA § 816.)

§ 18. (*a*) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges

filed in compliance with this section, except with the approval
the Commission and after ten days' public notice in the form
manner prescribed by the Commission, stating the increase
posed to be made; but the Commission for good cause shown
waive such notice.

Whenever the Commission finds that any rate, fare, cha
classification, tariff, regulation, or practice, demanded, charg
collected, or observed by such carrier is unjust or unreasonable
may determine, prescribe, and order enforced a just and reasona
maximum rate, fare, or charge, or a just and reasonable classif
tion, tariff, regulation, or practice.

(b)(1) From and after ninety days following October 3, 1
every common carrier by water in foreign commerce and e
conference of such carriers shall file with the Commission and k
open to public inspection tariffs showing all the rates and cha
of such carrier or conference of carriers for transportation to
from United States ports and foreign ports between all points
its own route and on any through route which has been establish
Such tariffs shall plainly show the places between which fre
will be carried, and shall contain the classification of freigh
force, and shall also state separately such terminal or other cha
privilege, or facility under the control of the carrier or confere
of carriers which is granted or allowed, and any rules or reg
tions which in anywise change, effect, or determine any part or
aggregate of such aforesaid rates, or charges, and shall incl
specimens of any bill of lading, contract of affreightment, or o
document evidencing the transportation agreement. Copies of s
tariffs shall be made available to any person and a reasona
charge may be made therefor. The requirements of this sec
shall not be applicable to cargo loaded and carried in bulk with
mark or count.

(2) No change shall be made in rates, charges, classificati
rules or regulations, which results in an increase in cost to
shipper, nor shall any new or initial rate of any common carrie

water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, changes, classifications, rules or regulations as changed are to become effective: Provided, however, That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foregoing commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

(6) Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451, § 18, 39 Stat. 735; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; As amended Oct. 3, 1961, Pub. L. 87-346, § 4, 75 Stat. 764; 46 USCA § 817.)

§ 19. Whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the Federal Maritime Board finds that such proposed increase rests upon changed conditions other than the elimination of said competition. (Sept. 7, 1916, c. 451, § 19, 39 Stat. 735; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USCA § 818.)

§ 21. The Federal Maritime Board and the Secretary of Commerce may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever

the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdeameanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment. (Sept. 7, 1916, c. 451, § 21, 39 Stat. 736; Ex. Ord. No. 6166, § 12 June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(5), 105(4), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1275, 1277; 46 USCA § 820.)

§ 22. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter. (Sept. 7, 1916,

c. 451, § 22, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, § 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 821.)

§ 23. Orders of the Federal Maritime Board relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the Federal Maritime Board, other than for the payment of money, made under this chapter, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Board, or be suspended or set aside by a court of competent jurisdiction. (Sept. 7, 1916, c. 451, § 23, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, Title IX, § 904, 49 Stat. 2016; Aug. 4, 1939, c. 417, § 1, 53 Stat. 1182; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 822.)

§ 29. In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise. (Sept. 7, 1916, c. 451, § 29, 39 Stat. 737; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 828.)

§ 30. In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in

which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order. (Sept. 7, 1916, c. 451, § 30, 39 Stat. 737; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 829.)

§ 32. Whoever violates any provision of this chapter, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine of not to exceed $5,000 (Sept. 7, 1916, c. 451, § 32, 39 Stat. 738; 46 USC § 831.)

§ 33. This chapter shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confer upon the Federal Maritime Board concurrent power or jurisdiction over any matter within the power or jurisdiction of such Interstate Commerce Commission; nor shall this chapter be construed to apply to intrastate commerce. (Sept. 7, 1916, c. 451, § 33, 39 Stat. 738; Ex.Ord.No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 832.)

§ 43. The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this chapter. (Sept. 7, 1916, c. 451, § 43, as added Oct. 3, 1961, Pub.L. 87—346, § 7, 75 Stat. 766; 46 USC § 841a.)

§ 45. This chapter may be cited as "Shipping Act, 1916" (Sept. 7, 1916, c. 451, § 45, formerly § 44, as added, July 15, 1918, c. 152, § 4, 40 Stat. 903, and renumbered Sept. 19, 1961, Pub.L. 87—254, § 2, 75 Stat. 522; 46 USC § 842.)

Intercoastal Shipping Act, 1933

§ 1. When used in this chapter—

The term "common carrier by water in intercoastal commerce" for the purposes of this chapter shall include every common and contract carrier by water engaged in the transportation for hire of passengers or property between one State of the United States and any other State of the United States by way of the Panama Canal. (Mar. 3, 1933, c. 199, § 1, 47 Stat. 1425; 46 USC § 843.)

§ 2. Every common carrier by water in intercoastal commerce shall file with the Federal Maritime Board and keep open to

public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and, if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water. The schedules filed, and kept open to public inspection as aforesaid by any such carrier shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force, and shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger consignor, or consignee, and shall include the terms and conditions of any passenger ticket, bill of lading, contract of affreightment, or other document evidencing the transportation agreement. The terms and conditions as filed with the Federal Maritime Board shall be framed under glass and posted in a conspicuous place on board each vessel where they may be seen by passengers and others at all times. Such carriers in establishing and fixing rates, fares, or charges may make equal rates, fares, or charges for similar service between all ports of origin and all ports of destination, and it shall be unlawful for any such carrier, either directly or indirectly, through the medium of any agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any such carrier from extending service to any publicly owned terminal located on any improvement project authorized by the Congress at the same rates which it charges at its nearest regular port of call. Such schedules shall be plainly printed, and copies shall be kept posted in a public and conspicuous place at every wharf, dock, and office of such carrier where passengers or freight are received for transportation, in

such manner that they shall be readily accessible to the public and can be conveniently inspected. In the event that any such schedule includes the terms and conditions of any passenger ticket, bill of lading, contract of affreightment or other document evidencing the transportation agreement, as herein provided, copies of such terms and conditions shall be made available to any shipper, consignee, or passenger upon request. Such terms and conditions, if filed as permitted by this section and framed under glass and posted in a conspicuous place on board each vessel where they may be seen by passengers and others at all times, may be incorporated by reference in a short form of same actually issued for the transportation, or in a dock receipt or other document issued in connection therewith, by notice printed on the back of each document that all parties to the contract are bound by the terms and conditions as filed with the Federal Maritime Board and posted on board each vessel, and when so incorporated by reference every carrier and any other person having any interest or duty in respect of such transportation shall be deemed to have such notice thereof as if all such terms and conditions had been set forth in the short form document. (Mar. 3, 1933, c. 199, § 2, 47 Stat. 1425; Ex.Ord.No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 104(2), 305, 306, 15 F.R. 3178, 64 Stat. 1274, 1277; Aug. 28, 1958, Pub.L. 85—810, 72 Stat. 977; 46 USC § 844.)

§ 3. Whenever there shall be filed with the Federal Maritime Board any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Board shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate,

fare, charge, classification, regulation, or practice: *Provided, however,* That there shall be no suspension of a tariff schedule or service which extends to additional ports, actual service at rates of said carrier for similar service already in effect at the nearest port of call to said additional port.

Pending such hearing and the decision thereon the Federal Maritime Board, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than four months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period. At any hearing under this paragraph the burden of proof to show that the rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the carrier or carriers. The Board shall give preference to the hearing and decision of such questions and decide the same as speedily as possible. (Mar. 3, 1933, c. 199, § 3, 47 Stat. 1426; Ex.Ord.No.6166, § 12, June 10, 1933; June 29, 1936, c. 858, Title IX, §§ 903(d), 904, 49 Stat. 2016; Aug. 4, 1939, c. 417, § 2, 53 Stat. 1182; 1950 Reorg.Plan No. 21, §§ 104(2), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 845.)

§ 4. Whenever the Federal Maritime Board finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded charged, collected, or observed by any carrier subject to the pro-

visions of this chapter is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice. *Provided*, That the minimum-rate provision of this section shall not apply to common carriers on the Great Lakes. (Mar. 3, 1933, c. 199 § 4, as added June 23, 1938, c. 600, § 43(a), 52 Stat. 964, and amended 1950 Reorg.Plan No. 21, §§ 104(2), 305, 306, eff. May 24, 1950, 18 F.R. 3178, 64 Stat. 1274, 1277; 46 USC § 845a.)

§ 5. The provisions of this chapter are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 801 of this title. (Mar. 3, 1933, c. 199, § 5, as added June 23, 1938, c. 600, § 43(a), 52 Stat. 964; 46 USC § 845b.)

§ 7. The provisions of the Shipping Act, 1916, as amended, shall in all respects, except as amended by this chapter, continue to be applicable to every carrier subject to the provisions of this chapter. (Mar. 3, 1933, c. 199, § 7, formerly § 5, 47 Stat. 1427, renumbered June 23, 1938, c. 600, § 43(c), 52 Stat. 965; 46 USC § 847.)

§ 8. This chapter may be cited as the Intercoastal Shipping Act, 1933. (Mar. 3, 1933, c. 199, § 8, formerly § 6, 47 Stat. 1427, renumbered June 23, 1938, c. 600, § 43(d), 52 Stat. 965; 46 USC § 848.)

Part III of the Interstate Commerce Act (Transportation Act of 1940)

§ 301. This chapter may be cited as part III of the Interstate Commerce Act. (Feb. 4, 1887, c. 104, Pt. III, § 301, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 929; 49 USC § 901.)

§ 302. For the purposes of this chapter—

(a) The term "person" includes any individual, firm, copartnership, corporation, company, association, joint stock association, and any trustee, receiver, assignee, or personal representative thereof.

(b) The term "Commission" means the Interstate Commerce Commission.

(c) The term "water carrier" means a common carrier by water or a contract carrier by water.

(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

(e) The term "contract carrier by water" means * * *

(f) The term "vessel" means * * *

(g) The term "transportation facility" includes * * *

(h) The term "transportation" includes * * *

(i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce", as used in this chapter, means transportation of persons or property—

(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;

(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States.

(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof.

(j) The term "United States" means the States of the United States and the District of Columbia.

(k) The term "State" means a State of the United States or the District of Columbia.

(l) The term "common carrier by railroad" means a common carrier by railroad subject to the provisions of chapter 1 of this title.

(m) The term "common carrier by motor vehicle" means a common carrier by motor vehicle subject to the provisions of chapter 8 of this title. (Feb. 4, 1887, c. 104, Pt. III, § 302, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 929; 49 USC § 902.)

[§ 303 (49 USC § 903) provides for certain exemptions and exceptions, affecting certain carriage (as carriage in bulk) and certain services. See *Barrett Line, Inc. v. United States,* 326 US 179.]

§ 304. (a) It shall be the duty of the Commission to administer the provisions of this chapter, and to that end the Commission shall have authority to make and amend such general or special rules and regulations and to issue such orders as may be necessary to carry out such provisions.

(b) The Commission shall have authority, for purposes of the administration of the provisions of this chapter, to inquire into and report on the management of the business of water carriers, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with water carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.

(c) The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carrier by water", or "contract carrier by water", as the special nature of the services performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements consistent with the provisions of this chapter to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest.

(d) Whenever it shall appear from complaint made to the Commission or otherwise that the rates, fares, regulations or practices of persons engaged in transportation by water to or from a port or ports of any foreign country in competition with

common carriers by water or contract carriers by water, caus
undue disadvantage to such carriers by reason of such competitio
the Commission may relieve such carriers from the provisions o
this chapter to such extent, and for such time, and in such manne
as in its judgment may be necessary to avoid or lessen such undu
disadvantage, consistently with the public interest and the nationa
transportation policy declared in this Act.

(e) Upon complaint in writing to the Commission by an
person, or upon its own initiative without complaint, the Commi
sion may investigate whether any water carrier has failed to com
ply with any provision of this chapter or with any requiremen
established pursuant thereto, and if, after notice of and hearin
upon any such investigation, the Commission finds that any suc
carrier has failed to comply with any such provision or requir
ment, it shall issue an appropriate order to compel such carri
to comply therewith. Whenever the Commission is of opinion th
any complaint does not state reasonable grounds for action on i
part, it may dismiss such complaint. (Feb. 4, 1887, c. 104, Pt. II
§ 304, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Sta
933; 49 USC § 904.)

§ 305. (a) It shall be the duty of every common carrier b
water, with respect to transportation subject to this chapter whi
it undertakes or holds itself out to perform, or which it
required by or under authority of this chapter to perform,
provide and furnish such transportation upon reasonable reque
therefor, and to establish, observe, and enforce just and reasonab
rates, fares, charges, and classifications, and just and reasonab
regulations and practices, relating thereto and to the issuanc
form, and substance of tickets, receipts, bills of lading, and ma
fests, the manner and method of presenting, marking, packin
and delivering property for transportation, the carrying of pe
sonal, sample, and excess baggage, the facilities for transportatio
and all other matters relating to or connected with such transpo

tation in interstate or foreign commerce. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

(b) It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. Common carriers by water subject to this chapter may also establish reasonable through routes and joint rates, charges, and classifications with common carriers by water subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act, 1933, as amended (including persons who hold themselves out to transport goods but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and such through routes and joint rates, and all classifications, regulations, and practices established in connection therewith shall be subject to the provisions of this chapter. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers.

(c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or

advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

(d) All common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to chapter 1 of this title. (Feb. 4, 1887, c. 104, Pt. III, § 305, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 934, and amended Aug. 24, 1962, Pub.L. 87—595, § 2, 76 Stat. 398; 49 USC § 905.)

§ 306. (a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign com-

merce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

(b) All charges of common carriers by water shall be stated in lawful money of the United States. The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published, filed, and posted; and the Commission is authorized to reject any tariff filed with it which is not in accordance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this chapter or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: *Provided*, That the provisions of section 1(7) and 22 of this title (which relate to transportation free and at reduced rates), together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water.

(d) No common carrier by water, unless otherwise provided by this chapter, shall engage in transportation subject to this chapter unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter. No change shall be made in any rate, fare, charge, classification, regulation, or practice specified in any effective tariff of a common carrier by water except after thirty days' notice of the proposed change filed and posted in accordance with this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow changes upon notice less than that herein specified, or modify the requirements of this section, either in particular instances or by general order applicable to special circumstances or conditions.

(e) It shall be the duty of every contract carrier by water to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith and to establish and observe reasonable regulations, and practices to be applied in connection with said reasonable minimum rates and charges. It shall be the duty of every contract carrier by water to file with the Commission, post, and keep open for public inspection, in accordance with such rules and regulations as the Commission shall prescribe, schedules of minimum rates or charges actually maintained and charged for interstate and foreign transportation to which it is a party, and any rule, regulation, or practice affecting such charges and the value of the service thereunder. No contract carrier by water, unless otherwise provided by this chapter, shall engage in transportation subject to this chapter unless the minimum rates or charges actually maintained and charged have been published, filed, and posted in accordance with the provisions of this chapter. No new rate or charge shall be established

and no reduction shall be made in any rate or charge, either directly or by means of any change in any rule, regulation, or practice affecting such rate or charge, or the value of service thereunder, except after thirty days' notice of the proposed new rate or charge, or of the proposed change, filed in accordance with this section. The Commission may, in its discretion and for good cause shown, allow the establishment of any such new rate or charge, or any such change, upon notice less than herein specified, or modify the requirement of this section with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the new rate or charge, or the change proposed to be made, and the time when it will take effect. It shall be unlawful for any such carrier to transport passengers or property or to furnish facilities or services in connection therewith for a less compensation, either directly or by means of a change in the terms and conditions of any contract, charter, agreement, or undertaking, than the rates or charges so filed with the Commission: *Provided*, That the Commission, in its discretion and for good cause shown, either upon application of any such carrier or carriers, or any class or group thereof, or upon its own initiative may, after hearing, grant relief from the provisions of this subsection to such extent, and for such time, and in such manner as, in its judgment, is consistent with the public interest and the national transportation policy declared in this Act. (Feb. 4, 1887, c. 104, Pt. III, § 306, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 935; 49 USC § 906.)

§ 307. (a) Any person may make complaint in writing to the Commission that any individual or joint rate, fare, charge, classification, regulation, or practice of any common carrier by water or any contract carrier by water is or will be in violation of this chapter. Every complaint shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(b) Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of opinion that any individual or joint rate, fare, or charge demanded, charged, or collected by any common carrier or carriers by water for transportation subject to this chapter, or any regulation, practice, or classification of such carrier or carriers relating to such transportation, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any provision of this chapter, it may determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful regulation, practice, or classification thereafter to be made effective.

(c) In any proceeding to determine the justness or reasonableness of any rate, fare, or charge of any common carrier by water there shall not be taken into consideration or allowed as evidence or elements of value of the property of such carrier either goodwill, earning power, or the certificate under which such carrier is operating; and in applying for and receiving a certificate under this chapter any such carrier shall be deemed to have agreed to the provisions of this subsection on its own behalf and on behalf of all transferees of such certificate.

(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the

Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15 of this title.

(e) Whenever, after hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and common carriers by railroad or by motor vehicle, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers. In cases where the joint rate, fare, or charge, was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and

determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

(f) In the exercise of its power to prescribe just and reasonable rates, fares, and charges of common carriers by water, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service.

(g) Whenever there shall be filed with the Commission any schedule (except a schedule referred to in section 922 of this title) stating a new rate, fare, charge, classification, regulation, or practice for the interstate or foreign transportation of passengers or property by a common carrier or carriers by water, the Commission may upon protest of interested parties or upon its own initiative at once, and, if it so orders, without answer or other formal pleading by such carrier or carriers, but upon reasonable notice, enter upon an investigation concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice, and pend-

ing such hearing and the decision thereon, the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto, as would be proper in a proceeding instituted after such rate, fare, charge, classification, regulation, or practice had become effective. If the proceeding shall not have been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period: ***Provided, however,*** That this subsection shall not apply to any initial schedule filed prior to October 1, 1941, by any such carrier (other than a carrier subject, at the time this chapter takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended, or the Shipping Act, 1916, as amended) insofar as such schedule names rates on traffic, or for services connected therewith, as to which such carrier was in bona fide operation on January 1, 1940. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

(h) Whenever, after hearing, upon complaint or its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by water, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, contravenes the national transportation policy declared in this Act, or is in contravention of any provision

of this chapter, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this chapter. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by water subject to this chapter, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in this Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(i) Whenever there shall be filed with the Commission by any such contract carrier any schedule (except a schedule referred to in section 922 of this title) stating a charge for a new service or a reduced charge, directly or by means of any rule, regulation, or practice, for transportation in interstate or foreign commerce, the Commission may upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether

completed before or after the charge, or rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change in any charge or rule, regulation, or practice shall go into effect at the end of such period: *Provided*, That this subsection shall not apply to any initial schedule filed prior to October 1, 1941, by any such carrier (other than a carrier subject, at the time this chapter takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended, or the Shipping Act, 1916, as amended) insofar as such schedule names charges on traffic, or for services connected therewith, as to which such carrier was in bona fide operation on January 1, 1940. The rule as to burden of proof specified in subsection (g) of this section shall apply to this subsection. (Feb. 4, 1887, c. 104, Pt. III, § 307 as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 937; 49 USC § 907.)

§ 308. (a) For the purposes of this section the term "carrier" means a common carrier by water.

(b) In case any carrier shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

(c) Any person or persons claiming to be damaged by any carrier may either make complaint to the Commission or may bring suit in his or their own behalf for the recovery of the damages for which such carrier may be liable under the provisions of

subsection (b) of this section, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies.

(d) If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof by any carrier, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(e) If such carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file with the district court of the United States for the district in which he or it resides or in which is located the principal operating office of such carrier or in which is located any port of call on a route operated by such carrier, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

(f) (1) (A) All actions at law by carriers subject to this chapter for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(B) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (D) of this subsection.

(C) For the recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within three years from the time the cause of action accrues, and not after, subject to subdivision (D) of this subsection, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(D) If on or before expiration of the two-year period of limitation in subdivision (B) of this subsection or the three-year period of limitation in subdivision (C) of this subsection a carrier subject to this chapter begins action under subdivision (A) of this subsection for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(2) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier and not after.

(3) A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(4) The term "overcharges" as used in this section means charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

(5) The provisions of this subsection shall extend to and e
brace all transportation of property or passengers for or on beh
of the United States in connection with any action brought bef
the Commission or any court by or against carriers subject to t
chapter: *Provided, however*, That with respect to such transpor
tion of property or passengers for or on behalf of the Uni
States, the periods of limitation herein provided shall be exte
ed to include three years from the date of (A) payment
charges for the transportation involved, or (B) subsequent refu
for overpayment of such charges, or (C) deduction made un
section 66 of this title, whichever is later.

(g) In such suits all parties in whose favor the Commissi
may have made an award of damages by a single order may
joined as plaintiffs, and all of the carriers parties to such or
awarding such damages may be joined as defendants, and su
suit may be maintained by such joint plaintiffs and against su
joint defendants in any district where any one of such joint pla
tiffs could maintain such suit against any one of such joint
fendants; and service of process against any one of such defe
ants as may not be found in the district where the suit is brou
may be made in any district where such defendant has his or
principal operating office. In case of such joint suit the recovery
any, may be by judgment in favor of any one of such plainti
against the defendant found to be liable to such plaintiff. (F
4, 1887, c. 104, Pt. III, § 308, as added Sept. 18, 1940, c. 7
Title II, § 201, 54 Stat. 940, and amended June 29, 1949, c. 2
§§ 2, 3(a), 4, 63 Stat. 281; Aug. 26, 1958, Pub.L. 85–762, § 1(
(6), 72 Stat. 860; 49 USC § 908.)

§ 309. (a) Except as otherwise provided in this section a
section 911 of this title, no common carrier by water shall enga
in transportation subject to this chapter unless it holds a certific
of public convenience and necessity issued by the Commission:

[Here follows a "grandfather clause" (see *Barrett Line, Inc. v. United States,* 326 U.S. 179, 180) and provisions regulating the issuance of certificates to common carriers and permits to contract carriers.]

(Feb. 4, 1887, c. 104, Pt. III, § 309, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 941 and July 12, 1960, Pub.L. 86–615, §§ 4, 5, 74 Stat. 384; 49 USC § 909.)

§ 313. (a) The Commission is authorized to require annual, periodical, or special reports from water carriers, lessors, and associations (as defined in this section), and to prescribe the manner and form in which such reports shall be made, and to require from such carriers, lessors, and associations specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, lessor, or association in such form and detail as may be prescribed by the Commission. Said annual reports shall contain all the required information for the period of twelve months ending on the thirty-first day of December in each year, unless the Commission shall specify a different date, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission. Such periodical or special reports as may be required by the Commission under this subsection shall also be under oath whenever the Commission so requires.

(b) The Commission may also require any such carrier to file with it a true copy of any contract, charter, or agreement between such carrier and any other carrier or person in relation to transportation facilities, service, or traffic affected by the provisions of this chapter. The Commission shall not, however, make public any contract, charter, or agreement between a contract carrier by water and a shipper, or any of the terms or conditions thereof, except

as a part of the record in a formal proceeding where it considers such action consistent with the public interest: *Provided,* That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by water as required by section 906 (e) of this title, the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof.

(c) The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this chapter, prescribe a uniform system of accounts applicable to any class of water carriers, and a period of time within which such class shall have such uniform system of accounts, and the manner in which such accounts shall be kept.

(d) The Commission shall, as soon as practicable, prescribe for water carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and rates so prescribed. When the Commission shall have exercised its authority under the foregoing provisions of this subsection, water carriers shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a rate of depreciation other than that prescribed therefor by the Commission, and no such carrier shall in any case include under operating expenses any depreciation charge in any form whatsoever other than as prescribed by the Commission.

(e) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by water carriers and lessors, including the accounts, records, and

memoranda of the movement of traffic, as well as of the receipts and expenditures of money, and it shall be unlawful for such carriers or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto.

(f) The Commission or its duly authorized special agents, accountants, or examiners shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents, of such water carriers and lessors, and of associations (as defined in this section), and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier as the Commission deems relevant to such person's relation to or transactions with such carrier. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to all lands, buildings, or equipment of such carriers or lessors, and shall have authority under its order to inspect and examine any and all such lands, buildings, and equipment. All such carriers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and for copying authorized by this subsection, and such carriers and lessors shall submit their lands, buildings, and equipment for inspection and examination, to any duly authorized special agent, accountant, or examiner of the Commission, upon demand and the display of proper credentials.

(g) The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, correspondence, or documents of water carriers or lessors as may, after a reasonable time, be destroyed, and prescribing the length of time the same shall be preserved.

(h) As used in this section, the words "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained; the term "lessor" means a lessor of any right to operate

as a water carrier; the term "water carrier" or "lessor" includes a receiver or trustee of such water carrier or lessor; and the term "association" means an association or organization maintained solely by water carriers subject to this chapter which engages in activities relating to the fixing of rates, publication of classifications, or filing of schedules by such carriers. (Feb. 4, 1887 c. 104, Pt. III, § 313, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 944, and amended Aug. 2, 1949, c. 379, §§ 16-18, 63 Stat. 488; 49 USC § 913.)

§ 314. If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. (Feb. 4, 1887, c. 104, Pt. III, § 314, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 945; 49 USC § 914.)

§ 315. (a) It shall be the duty of every water carrier to file with the Commission a designation in writing of the name and post-office address of an agent upon whom or which service of notices or orders may be made under this chapter. Such designation may from time to time be changed by like writing similarly filed. Service of notices or orders in proceedings under this chapter may be made upon such carrier by personal service upon it or upon an agent so designated by it, or by mail addressed to it or to such agent at the address filed. In default of such designation, service of any notice or order may be made by posting in the office of the secretary of the Commission. Whenever notice or order is served by mail, as provided herein, the date of mailing shall be considered

as the time of service. In proceedings before the Commission involving the lawfulness of rates, fares, charges, classifications, or practices, service of notice of the suspension of a tariff or schedule upon an attorney in fact of a carrier who has filed a said tariff or schedule in behalf of such carrier naming the rates, fares, charges, classification, or practices involved in such proceedings shall be deemed to be due and sufficient service upon the carrier and service of notice of the suspension of a joint tariff or schedule upon a carrier which has filed said joint tariff to which another carrier is a party naming the rates, fares, charges, classifications, or practices involved in such proceedings shall be deemed to be due and sufficient service upon the several carriers parties thereto, but such manner of service shall not be considered as excluding service in any other manner authorized by law.

(b) No order, based upon a finding that any water carrier has violated any provision of this chapter, shall be made by the Commission except after hearing upon complaint or after an investigation upon its own initiative.

(c) The Commission may suspend, modify, or set aside its orders under this chapter upon such notice and in such manner as it shall deem proper.

(d) Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(e) It shall be the duty of every water carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect. (Feb. 4, 1887, c. 104, Pt. III, § 315, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat.

946, and amended Aug. 2, 1949, c. 379, § 19, 63 Stat. 489; 49 USC § 915.)

§ 316. (a) The provisions of sections 12, 17, and 46-48 of this title shall apply with full force and effect in the administration and enforcement of this chapter.

(b) If any water carrier fails to comply with or operates in violation of any provision of this chapter (except provisions as to the reasonableness of rates, fares, or charges, and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder (except an order for the payment of money), or of any term or condition of any certificate or permit, the Commission or the Attorney General of the United States (or, in case of such an order, any party injured by the failure to comply therewith or by the violation thereof) may apply to any district court of the United States having jurisdiction of the parties for the enforcement of such provision of this chapter or of such rule, regulation, requirement, order, term, or condtion; and such court shall have jurisdiction to enforce obedience thereto by a writ or writs of injunction or other process, mandatory or otherwise, restraining such carrier and any officer, agent, employee, or representative thereof from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining obedience thereto.

(c) The Commission shall enter of record a written report of hearings conducted upon complaint, or upon its own initiative without complaint, stating its conclusions, decisions, and order and, if reparation is awarded, the findings of fact upon which the award is made; and shall furnish a copy of such report to all parties of record. The Commission may provide for the publication of such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be received as competent evidence of such reports in any court of competent jurisdiction.

(d) Subject to the provisions of section 913 of this title, the copies of schedules, and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements of water carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required, under the provisions of this chapter shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals. (Feb. 4, 1887, c. 104, Pt. III, § 316, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 946; 49 USC § 916.)

§ 317. (a) Any person who knowingly and willfully violates any provisions of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate or permit, for which no penalty is otherwise provided, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was in whole or in part committed shall be subject for each offense to a fine not exceeding $500. Each day of such violation shall constitute a separate offense.

(b) Any water carrier or any officer, agent, employee, or representative thereof, who shall knowingly and willfully offer, grant, or give, or cause to be offered, granted, or given, any rebate, deferred rebate, or other concession, in violation of the provisions of this chapter, or who, by any device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person to obtain transportation subject to this chapter at less than the rates, fares, or charges lawfully in effect, shall be deemed guilty

of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed shall be subject for each offense to a fine of not more than $5,000.

(c) Any person who shall knowingly and willfully solicit, accept, or receive any rebate, deferred rebate, or other concession in violation of the provisions of this chapter, or who shall by any device or means, whether with or without the consent or connivance of any water carrier or his or its officer, agent, employee, or representative, knowingly and willfully obtain transportation subject to this chapter at less than the rates, fares, or charges lawfully in effect, or shall knowingly and willfully, directly or indirectly, by false claim, false billing, false representation, or other device or means, obtain or attempt to obtain any allowance, refund, or repayment in connection with or growing out of such transportation, whether with or without the consent or connivance of such carrier or his or its officer, agent, employee, or representative, whereby the compensation of such carrier for such transportation or service, either before or after payment, shall be less than the rates, fares, or charges lawfully in effect, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was in whole or in part committed, be subject for each offense to a fine of not more than $5,000.

(d) Any water carrier or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this chapter, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall willfully falsify, destroy, mutilate, or alter any report, account, record, memorandum, book, correspondence, or

other document, required under this chapter to be kept, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions as required under this chapter, or shall willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, or shall knowingly and willfully file with the Commission any false report, account, record, or memorandum, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was in whole or in part committed, be subject for each offense to a fine of not more than $5,000. As used in this subsection, the word "keep" shall be construed to mean made, prepared, or compiled, as well as retained.

(e) Any special agent, accountant, or examiner of the Commission who knowingly and willfully divulges any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of section 913 of this title, except as he may be directed by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than $500 or imprisonment for a term not exceeding six months, or both.

(f) It shall be unlawful for any common carrier by water, or any officer, receiver, trustee, lessee, agent, or employee of such carrier, or for any other person authorized by such carrier or person to receive information, knowingly and willfully to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such carrier for transportation subject to this chapter, which information may be used to the detriment or prejudice of such shipper or

consignee, or which may or does improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person to solicit or knowingly and willfully receive any such information which may be or is so used. Any person violating any provisions of this subsection shall be guilty of a misdemeanor and upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was in whole or in part committed shall be subject to a fine of not more than $2,000. Nothing in this chapter shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States or of any State, Territory, or District thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers. (Feb. 4, 1887, c. 104, Pt. III, § 317, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 947; 49 USC § 917.)

§ 318. No common carrier by water shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for periodical settlement, and to prevent unjust discrimination or undue preference or prejudice: *Provided*, That the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where such carrier is instructed by a

shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (1) is an agent only and had no beneficial title in the property, and (2) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made or handled. An action for the enforcement of such liability may be begun within two years from the time the cause of action accrues, or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within said period. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. An action for the enforcement of such liability may be begun within two years from the time the cause of action accrues, or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within said period. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or

abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. (Feb. 4, 1887, c. 104, Pt. III, § 318, as added Sept. 18, 940, c. 722, Title II, § 201, 54 Stat. 949; 49 USC § 918.)

§ 320. (a) The Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended are repealed insofar as they are inconsistent with any provision of this chapter and insofar as they provide for the regulation of, or the making of agreements relating to, transportation of persons or property by water in commerce which is within the jurisdiction of the Commission under the provisions of this chapter; and any other provisions of law are repealed insofar as they are inconsistent with any provision of this chapter.

(b) Nothing in subsection (a) of this section shall be construed to repeal—

(1) section 1115 of Title 46, or any provision of law providing penalties for violations of said section;

(2) the third sentence of section 844 of Title 46, as extended by section 845b of Title 46, or any provision of law providing penalties for violations of section 844 of Title 46;

(3) the provisions of the Shipping Act, 1916, as amended, insofar as such Act provides for the regulation of persons included within the term "other person subject to this chapter", as defined in such Act;

(4) sections 883 and 884 of Title 46.

(c) Nothing in subsection (a) of this section shall be construed to affect the provisions of section 814 of Title 46 so as to prevent any water carrier subject to the provisions of this chapter from entering into any agreement under the provisions of said section with respect to transportation not subject to the provisions of this chapter in which such carrier may be engaged.

(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or

damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter.

(e) Subsection (e) of section 153 of this title, is repealed as of October 1, 1940: *Provided, however,* That (1) any certificate of public convenience and necessity granted to any carrier pursuant to the provisions of said subsection shall continue in effect as though issued under the provisions of section 909 of this title; and (2) through routes and joint rates, and rules, regulations, and practices relating thereto, put into effect pursuant to the provisions of said subsection shall, after the repeal of said subsection, be held and considered to have been put into effect pursuant to the provisions of the Interstate Commerce Act, as amended. (Feb. 4, 1887, c. 104, Pt. III, § 320, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 950; 49 USC § 920.)

No. 872

Served
July 28, 1965
Federal Maritime Commission

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE

[Footnotes indicated by numbers are those of the Report. Foo notes indicated by letters are ours.]

[Headnotes and appearances omitted.]

REPORT

By the Commission: (John Harllee, Chairman; Ashton C. Ba rett and James V. Day, Commissioners)

This matter is before us on exceptions to the Initial Decisio of Chief Examiner Gus O. Basham.

The Federal Maritime Board, our predecessor, instituted thi investigation on its own motion on October 26, 1959, in orde to determine whether Agreement No. 8200 between the mem ber lines of the Far East Conference and the member lines of th Pacific Westbound Conference is a true and complete agreemen between the parties; whether Agreement No. 8200 is being carrie out in a manner which makes the agreement unjustly discrimina tory or unfair as between carriers, shippers, exporters or ports or between exporters from the United States and their foreig competitors; and whether the Agreement operates to the detri

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1. Commissioner George H. Hearn did not participate.

ment to the commerce of the United States or violates the Shipping Act, 1916.

Agreement No. 8200 was signed on November 5, 1952, and was approved by the Federal Maritime Board pursuant to section 15 of the Shipping Act, 1916, on December 29, 1952. By the terms of the agreement, the parties thereto agree to establish from time to time "rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates,"[a] excepting rates on twelve specified commodities. The agreement further stipulates the procedures for subsequent meetings or inter-conference interchanges of information to accomplish the objectives of the agreement.

[Here is a brief statement of some of the steps leading up to the making and approval of Agreement No. 8200 Articles First and Second of the Agreement (R 47-49) are then set out in full, and the remaining Articles are very briefly summarized.]

The members of the respondent Conferences have met and adopted resolutions or have collectively agreed to a common course of action at meetings held at least annually since 1953, as evidenced by written minutes which were furnished to the Board and the Commission.

At a meeting in May 1956, the following action was taken: "At the close of each Joint Meeting the Spokesmen for the two Conferences shall agree upon that portion of the Minutes of that Meeting which shall become a part of the Memorandum of Decisions." These Memoranda are exhibits in the record of this proceeding.

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a. The quoted language is not part of any of the contractual undertakings but is only a part of paragraph 4 of the recitations and is only a recitation that "for the accomplishment of the purposes of this agreement it is essential that the parties shall, from time to time, establish the rates to be charged etc." (R 47) The principal contractual provisions are in "First" and "Second". (R 47-49)

I. *The supplementary agreements.*

We now come to the first issue set out in the Order of Investigation, which is: Is Agreement No. 8200 a true and complete agreement between the parties? The Examiner held that the agreement was not a true and complete agreement between the parties, and that the conferences should file various "supplementary agreements"[1] with the Commission for approval before reapproval of Agreement No. 8200 is given by the Commission. The respondent conferences have excepted to this finding, arguing that these supplemental agreements are within the contemplation of the joint agreement, because the first paragraph of the joint agreement provides:

> The initial meeting shall make rules . . . for the transaction of such . . . business as the parties may be permitted to conduct by virtue hereof including the provision of the machinery for the change of rates. . . .

The conferences further argue that, even if the supplementary agreements are not encompassed within the scope of the joint agreement, they have received the blessing of the Commission's predecessor, and the Commission is prevented by reason of the principle of "administrative estoppel" from finding a violation of the Shipping Act, 1916. We disagree with respondents as to both of their arguments, for the reasons hereinafter stated.

The threshold question as we see it is whether or not the supplementary agreements are within the purview of section 15, which reads in pertinent part, as follows:

[Here the first paragraph of § 15 is set out.]

As early as 1927, the United States Shipping Board, one of our predecessor agencies, limited the language of section 15:

> As contended by conference representatives in this proceeding, a too literal interpretation of the word "every" to in-

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1. These supplementary agreements which deal with placement of items on the initiative list, overland rates, and concurrence procedures are described more fully, *infra.*

> clude routine actions between the carriers under conference agreements would result in delays and inconvenience to both carriers and shippers. *Ex Parte 4, Section 15 Inquiry,* 1 U.S. S.B. 121, at 125 (1927).

Subsequent cases have elaborated on the aspect of "routine actions" so as to confine the same to day-to-day interstitial workings under the agreement. Thus, in *Mitsui Steamship Company v. Anglo-Canadian Shipping Co.,* 5 F.M.B. 72 (1956), the Federal Maritime Board held that a "new conference interpretation is an agreement or a modification of an approved agreement between carriers which requires specific approval under section 15 of the Act, ..." 5 F.M.B. at 91-92. And, in 1957, the Board held that an agreement between Matson Navigation Co. and Encinal Terminals was not a true and complete agreement:

> In approving Agreement No. 8063, the Board sanctioned an agreement under which Matson and Encinal were to form a corporation known as Matcinal, which agreement is little more than evidence of a general intention of the parties to enter the stevedoring, terminal, and carloading and unloading business as partners acting through the new corporate entity. *Associated-Banning Co. et al. v. Matson Navigation Co. et al.,* 5 F.M.B. 336, at 341 (1957).

More recently, we have elaborated on the definition of "routine" in *Pacific Coast Port Equalization Rule,* 7 F.M.C. 623 (1963). In that case we determined that a rule providing for port equalization did "not constitute conventional or routine rate-making among carriers. It is a new arrangement for the regulation and control of competition. Moreover, it affects third party interests such as ports and facilities from which traffic is drawn and it obviously is not 'a pure regulation of intra-conference competition.' " 7 F.M.C. 623, at 630. In affirming the Commission, the U.S. Court of Appeals for the Ninth Circuit stated:

> We are unable to agree with petitioners that Rule 29 is within the scope of their approved Conference Agreement.

> Such agreement contains no provision expressly authorizing port equalization, nor do we find any implicit authority contained therein. *American Export & Isbrandtsen Lines, et al. v. Federal Maritime Commission, et al.*, 334 F.2d 185, 198 (1964).

We think that the holdings in the Commission decisions cited above clearly militate in favor of the position that the "supplementary agreements" were not within the purview of Agreement No. 8200 and were not routine, day-to-day arrangements which are exempt from the filing requirements of section 15. The *Associated Banning* case is particularly in point. It appears to us that Agreement No. 8200 is nothing more than evidence of a general intention of the parties to enter into concerted rate-making. It sets out no details, no procedures, with the exception of the procedures to be taken at the initial meeting, nor does it inform any interested person as to how the agreement is to work.

Although not articulated in past cases, we are of the opinion that the applicable test here is whether or not the Agreement as filed with the Commission and as approved sets out in adequate detail the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. Any interested party should be able, by a reading of the agreement, to ascertain how the agreement is to work, without resort to inquiries of the parties or an investigation by the Commission. This is not to say that we are limiting the scope of "routine actions" which need not be the subject of section 15 filings; we are merely giving purpose to the requirements of the section. We can see no reason for the filing of agreements if they do not inform the Commission and the public in more than the barest outline as to how the agreement is to be carried out. No one reading Agreement No. 8200 could reasonably have been informed as to the procedures under which the respondent conferences were carrying out the agreement nor as to the nature of

the supplementary agreements which respondents claim are within the contemplation of Agreement No. 8200. Thus, we hold that the supplementary agreements relating to rate-making initiative, overland rates, rate differentials and the concurrence procedures (encompassing all instances of the operation of the concurrence machinery except for the placement of items on the agenda of the initial meeting)[2] are without sanction in the basic Agreement No. 8200, were therefore required by section 15 of the Shipping Act, 1916, to be filed with the Commission for approval, and, not having been so filed, were and are being carried out in violation of the said section 15.

[Here the Report discusses the claim of "administrative estoppel". We omit this, except the next following paragraph because in this proceeding no one has suggested that any agreements outside No. 8200 have been filed or approved.]

The only agreement filed by respondents in accordance with the Commission's rules regulating the manner of filing agreements was Agreement No. 8200. The actions at the various meetings produced oral agreements which were reduced to memoranda thereof in the form of minutes. The minutes were further abstracted and put into a "Memorandum of Decisions." These were clearly not filed pursuant to the Commission's rules accompanied by a letter of transmittal "stating that they are offered for file in compliance with section 15 of the Shipping Act, 1916, ..." 46 CFR § 522.1.

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II. *The concurrence procedures.*

The Examiner found in his Initial Decision that the supplementary agreement requiring both respondent conferences to concur in matters voted on is sanctioned by the joint agreement, but is in violation of Public Law 87-346. We think that a brief dis-

2. See our discussion of the concurrence procedures, *infra.*

cussion of the concurrence procedures as we understand them is in order.

First, all matters coming before the initial meeting held pursuant to the agreement were subject to concurrence before being placed on the agenda of the initial meeting. Agreement No. 8200 specifically provides that "All matters coming before the initial meeting for consideration and action shall be determined only by a concurrence of the PACIFIC LINES acting as a group, and of the ATLANTIC/GULF LINES, acting as a group, each in accordance with the procedures prescribed by its respective Conference Agreement, with respect to the establishment or change of rates." The above-quoted provision is the only specific reference in Agreement 8200 to the concurrence procedure. However, the initial meeting and procedure adopted subsequent thereto extended the concurrence procedure in the following additional circumstances:

(1) The assignment of items to the initiative list is subject to concurrence, although there is a prior requirement that seventy percent of the total annual movement of cargo of a particular item must be handled by the conference obtaining that item on its list. The Examiner found (Initial Decision, pp. 4-5) that "At the initial meeting . . . respondents established the basic principles . . . (4) the manner of voting on the assignment to a conference of rate-making power or "initiative" on certain items, and the manner of voting of individual rate applications on other items . . . ."

(2) Rate changes on competitive items are subject to concurrence, as found by the Examiner (Initial Decision, p. 5) that the parties set up machinery governing "the manner of voting on individual rate applications on other items, i.e. a requirement that both conferences must concur in all such actions." This is admitted by one of the respondents, Pacific Westbound Conference, in its Exceptions to the Initial Decision:

> Moreover, the ultimate treatment of shippers whose commodities are on the initiative list and of those whose commodities are not on the list is exactly the same . . . . The procedure is no different for initiative commodities. Exceptions, p. 21.

(3) Rate changes on initiative items are subject to concurrence where the conference requesting a particular change does not have the initiative (i.e., such as the request for change in rate on evaporated milk when PWC did not have the initiative). This fact is borne out by the record developed in this case, and, more particularly, by the facts pertaining to the charge of discrimination made by Carnation Company (which will be discussed, *infra.*). These added instances of the operation of the concurrence procedure appear to us to go far beyond an agreement to concur in matters voted on. Were we confined to the latter, we could agree with the Examiner that the basic agreement sanctions the concurrence procedure. However, the concurrence procedures touch other matters than the content of the agenda of the initial meeting. Respondents will therefore be required to cease and desist from carrying out the concurrence procedures until the same be filed with and approved by the Commission.

The respondent conferences have excepted to the Examiner's finding that the concurrence procedure does not meet the tests of the "independent action" provisions of P.L. 87-346. The conferences point out that Article Second of Agreement No. 8200 "clearly reserves the right of each conference to act independently of the procedures adopted in and pursuant to the agreement." The Examiner decided "as a matter of law that the concurrence provision is illegal, regardless of any testimony in support thereof." He relied on the provision of section 15 which directs the Commission not to approve any agreement between conferences and carriers serving different trades that would otherwise be competitive unless each conference retains the right of inde-

pendent action. The Examiner has held that the statutory requirement is not met if, under certain circumstances, the parties do not exercise the right of independent action. The Examiner has therefore translated the mere existence of the right to a requirement that it be exercised. We think that the Examiner has applied the statute too strictly, and we therefore sustain the conferences' exception.

Section 15 provides a standard for approval of agreements based on the contents of the agreements. In the instant case, the agreement creates a "right" of independent action after certain preliminary notices to the other party. The Examiner, however, considered that the facts of the operation of the agreement are controlling, rather than the bare provisions of the agreement, relying on selected excerpts from House Report 498, 87th Cong., 1st Sess., pp. 9-10 which in turn refer to how a joint agreement "has operated." We believe that Congress was only restricting the authority to approve agreements when it enacted P.L. 87-346, and was not establishing standards by which to judge the operations of agreements. Upon an initial examination of an agreement between conferences, we are confined to a determination as to whether or not the agreement provides for the right of independent action. That is all the statute requires. And, Agreement No. 8200 meets the statutory requirement in specific terms. This is not to say, however, that in the future we would be confined to "the four corners" of an agreement in a subsequent proceeding to determine whether an agreement should be reapproved, modified, or disapproved. It could well be that actual operations under an agreement, subsequent to our initial approval, might show that the agreement was being carried out in a manner as to make it detrimental to the commerce of the United States or contrary to the public interest. Then, disapproval would be in order.

In conclusion, the statute provides adequate means for disapproval should the same be required. We do not, however,

find that such disapproval is warranted by the evidence of record in this case. We are unable to find any evidence of a secret agreement between Pacific Westbound and Far East that Pacific Westbound would give up its right of independent action. Such an agreement, we hold, has never existed. The right was created in Agreement 8200 in conformance with the statutory requirement, and it was never given up.

III. *The initiative list.*

The Examiner found that the manner of determining whether or not commodities are placed on the rate-making initiative is violative of section 16 of the Shipping Act, 1916, in that the procedure subjects shippers to undue prejudice and disadvantage. The conferences have excepted to this finding, and the Far East Conference has taken further exception to the Examiner's finding that it unjustly discriminated against Carnation Company by refusing to concur in Pacific Westbound's requests for the initiative on evaporated milk until May of 1961.

The initiative procedure provides a method whereby certain commodities are classified in two categories in such a way as to locate the power to change rates with or without agreement or concurrence. The conferences first agreed that the so-called "local initiative" rate-making authority would be established with respect to an agreed list of commodities if seventy percent of the total annual movement originated in either conference's local territory. Later, in 1956, the method of agreeing on the commodities to be listed was changed to require concurrence by the other conference before establishing "rate-making initiative on commodities, pursuant to the formula." An agreed list was then prepared.

The commodity evaporated milk in 1953 was not classified and placed on the list of Pacific Westbound and remained off the list until 1961, after this proceeding was instituted, even though in 1960-1961 ninety percent or more of the evaported milk was

moving from the West Coast to the Philippines. The record shows that before 1961 Far East had refused to concur in such placement in spite of the formula commitment the conferences made to each other regarding the seventy percent test.

A right to concur was established in May 1956, when it was agreed "authority to establish rate-making initiative on commodities pursuant to the formula defined in the preceding paragraph [the seventy percent formula] may only be granted[b] . . . after concurrence by the other Conference."

Carnation, a shipper of evaporated milk, was affected before and after the right to concur was established. Before May 1956, evaporated milk remained off the initiative list of Pacific Westbound for no apparent reason, and after May 1956 because Far East would not concur. Apparently, no request should have been needed in either period to classify evaporated milk as an "initiative" commodity. Carnation's first record request for a rate change by Pacific Westbound was on November 11, 1957, after the addition of the concurrence procedure. Carnation was unsuccessful because Far East would not concur, although at this time Carnation did not know why because the initiative list and concurrence procedure were still secret[3] as far as Carnation was concerned. Carnation persisted in its efforts and Pacific Westbound persisted in trying to obtain concurrence (December 1957 through May 1958—13 exchanges between Far East and Pacific Westbound), but without success for three years, even though Far East was handling ten percent or less of the volume of evaporated milk shipped to the Philippines.

Both before and after the concurrence procedure was added, Carnation and the public had every reason to believe that Pacific

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b. The omitted words are "to the Conference desiring such initiative".

3. The minutes of the first meeting state that the "proceedings of minutes are confidential" and that "unauthorized disclosure to shippers of information regarding rate changes" and positions "regarding rate requests is contrary to the spirit of the Joint Agreement."

Westbound was making its own decisions on rates based on the economics of shipment from the West Coast. It was developed in the record that this was far from the case and not only was the concurrence procedure interfering with Pacific Westbound's initiative decisions, but that Far East had conflicting interests in that it had to protect the movement of powdered milk from the East Coast. A shipper of powdered milk had demanded the same reduction as evaporated milk, so a change in the evaporated milk rate would affect the revenues of Far East members.

This conduct on the part of Far East and acquiescence therein by Pacific Westbound in the exercise of their respective powers shows that the seventy percent rule for giving the rate-making initiative, whether or not affected by the concurrence restriction, became a sham. The agreed-upon condition called for the exercise of independent action by Pacific Westbound, but it failed to act independently as it had a right to do under Article "SECOND" of Agreement No. 8200. Both Far East and Pacific Westbound, we hold, subjected Carnation, as a shipper; West Coast ports, as localities; and the commodity evaporated milk to unreasonable disadvantage in violation of section 16 of the Shipping Act, 1916. In our opinion the respondents' failure to abide by commitments when it suited the interests of the parties, without satisfactory reason, made the disadvantage "unreasonable."

In our view, Pacific Westbound violated section 16 of the Shipping Act, 1916, by not taking independent action when it clearly had the right so to do. This is not to say that the right had been surrendered, or that the circumstances of this case warrant a disapproval of Agreement No. 8200 under section 15 of the Shipping Act. We rest our charge against Pacific Westbound solely on section 16 of the Act. Likewise, Far East violated section 16 of the Act, but here the violation results not from a failure to carry out the terms of an approvel agreement (as in the case of Pacific Westbound) but in Far East's failure to imple-

ment fully the terms of the supplemental agreements as we understand them. We have no difficulty, however, in finding this conduct on the part of Far East to be a violation of the Shipping Act. Section 16 does not specify that "any undue or unreasonable prejudice or disadvantage" shall flow from a failure to adhere to *approved* agreements.

We think that it would be a most unrealistic view to hold that Far East's conduct is without the scope of the Shipping Act, merely because it consisted of a failure to adhere to unfiled and unapproved agreements. Likewise absurd would be a holding that because the agreements were unfiled and unapproved, no violation of the Act could result from Far East's conduct. From whatever sources the violation arose, the conduct constituted "undue or unreasonable prejudice or disadvantage" and was in violation of the Act.[4]

IV. *Overland rates.*

The second supplementary agreement which we have found, *supra,* not to have been filed for approval concerns the maintenance of rate differentials for commodities from the overland territory.

[Discussion of this agreement is omitted. Discussion of modification of Agreement No. 8200 is omitted.]

The Examiner refers to the supplementary agreements as though they might be approved in their present form. However, their present form is far from definite. The supplementary agreements which we have found to have been unfiled and to have been required to be filed consist of oral agreements reduced to memoranda, in the form of abstracts or summaries of minutes of meetings. If it has been assumed that these are now before the Com-

4. We note that Carnation has not filed a timely complaint for reparations under section 22 of the Shipping Act, 1916, and that such a complaint would now be barred by the two year Statute of Limitations in that section.

mission for approval, the assumption is misplaced. They are only before us in the form of exhibits in this record and cannot be treated as filed agreements. Filing pursuant to the regulations of the Commission is an essential prerequisite to an adjudication as to approvability. We find that on the basis of this record it is impossible to determine the scope of the unfiled supplementary agreements, the precise subjects covered by the agreements, the objectives to be achieved, and whether or not the agreements can be approved pursuant to the standards set forth in section 15 of the Shipping Act, 1916. We therefore reverse the Examiner to the extent that he found that Agreement No. 8200 should be reapproved after the amendments are filed. Should the parties to Agreement No. 8200 decide to file these supplementary agreements, they would then be in a form suitable for action by the Commission pursuant to section 15.

CONCLUSION

In summary, we conclude

(1) that the various supplementary agreements affecting overland rates, the concurrence procedures, and the placement of items on the initiative list, constitute unapproved agreements which should have been filed with us for action pursuant to section 15; and not having been so filed and approved the parties to Agreement No. 8200 are hereby ordered to cease and desist from carrying them out;

(2) the doctrine of administrative estoppel is inapplicable as regards so-called "tacit approval" by various members of the staff of our predecessor agency of these supplementary agreements;

(3) the right of independent action is preserved by Agreement No. 8200, as required by section 15 of the Ship-

ping Act, 1916, and neither party is found to ha surrendered the right by means of a secret agreemer

(4) past conduct by respondents in regard to their tre ment of Carnation Company has been in violation section 16 of the Shipping Act, 1916;

(5) the Commission cannot at this time guarantee reapprov of Agreement No. 8200 if the various supplementa agreements are filed for approval, as the scope, conten and procedures carried out under these agreemer are uncertain; and

(6) there is insufficient evidence in the record before us which to base disapproval at this time of Agreeme No. 8200.

Respondents will be ordered to cease and desist from carryi out their supplementary agreements until filed with and approv by the Commission. An appropriate order will be entered.

A separate opinion concurring and dissenting with the majori report will be issued on or about August 2, 1965, by Comm sioner John S. Patterson.

[Separate opinion of Commissioner Patterson is omitted. H agreed that the agreements other than No. 8200 were outsi No. 8200, were required to be filed and approved, but were n and were carried out.]

No. 872

JOINT AGREEMENT BETWEEN MEMBER LINES OF THE FAR EAST CONFERENCE AND THE MEMBER LINES OF THE PACIFIC WESTBOUND CONFERENCE ORDER

Full investigation in this proceeding having been had, and the Commission on this day having made and entered of record a report stating its conclusion and decisions thereon, which report is hereby referred to and made a part hereof, and having found that the supplementary agreements affecting overland rates, concurrence procedures, and the placement of items on the initiative list constitute unapproved agreements which are required to be filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916,

Therefore, It Is Ordered, That the respondents, Far East Conference and Pacific Westbound Conference, cease and desist from carrying out such supplementary agreements until filed with and approved by the Commission.

By the Commission.

/s/ THOMAS LISI
Thomas Lisi
Secretary

(SEAL)